

## Notes:

# CEDAW, the Islamic State, and Conflict-Related Sexual Violence

### ABSTRACT

*Tales of the Islamic State (ISIL) and the group's brutality shocked the world for several years. Now, however, ISIL has been nearly defeated. As ISIL has lost territorial control, the world has learned more details about its cruel enslavement system, including the severe sexual violence that ISIL inflicted on the Yazidis. Now, many advocates are calling for justice for the Yazidis and other victims of ISIL's sexual violence. This Note uses the case of the Yazidis to examine the strengths and limits of the international framework for addressing conflict-related sexual violence. In particular, this Note examines the history of the international community's response to conflict-related sexual violence and how the Convention on the Elimination of All Forms of Discrimination Against Women provides a useful, though imperfect, framework for addressing this issue. This Note discusses how the due diligence standard requires states to investigate, punish, and redress conflict-related sexual violence, and how Iraq, in its current state, may provide accountability for the crimes committed by ISIL through prosecutions, reparations, and other reforms.*

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## I. INTRODUCTION

In October 2017, the Islamic State's (ISIL) so-called capital of Raqqa fell to a US-backed alliance of Syrian fighters, representing a kind of symbolic end to ISIL as a self-declared nation-state controlling significant physical territory.<sup>1</sup> Similarly, with the capture of Mosul and other ISIL territory, Iraqi forces have celebrated the nearly complete defeat of ISIL in Iraq.<sup>2</sup> As these forces recapture territory, the process of reintegration and redress for civilians who suffered under Islamic State control is an imminent issue.

On August 22, 2017, the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Assistance Mission for Iraq issued a human rights report regarding the protection of rights of victims who experienced sexual violence under ISIL in Iraq.<sup>3</sup> The report describes how large numbers of women and girls, as well as a number of men and boys, suffered conflict-related sexual violence by ISIL.<sup>4</sup> The report also lays out the

1. *Raqqa: IS 'capital' falls to US-backed Syrian forces*, BBC (Oct. 17, 2017), <http://www.bbc.com/news/world-middle-east-41646802> [<https://perma.cc/4BFM-RUQF>] (archived Aug. 26, 2018).

2. David Zucchini, 'Game Over.' *Iraqi Forces See Beginning of the End for ISIS*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/world/middleeast/iraq-isis-hawija.html> [<https://perma.cc/6QA8-SJB4>] (archived Aug. 30, 2018).

3. See generally U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, PROMOTION AND PROTECTION OF RIGHTS OF VICTIMS OF SEXUAL VIOLENCE CAPTURED BY ISIL/OR IN AREAS CONTROLLED BY ISIL IN IRAQ (2017), [http://www.ohchr.org/Documents/Countries/IQ/UNAMIRreport22Aug2017\\_EN.pdf](http://www.ohchr.org/Documents/Countries/IQ/UNAMIRreport22Aug2017_EN.pdf) [<https://perma.cc/253L-NMUE>] (archived Aug. 26, 2018) [hereinafter OHCHR UNAMI Report].

4. *Id.* ¶ 1.

legal framework—international, national, and regional laws—for supporting these victims and provides recommendations for the Iraqi government to pursue in order to best protect the rights of women and girls who survived conflict-related sexual violence.<sup>5</sup>

Due to the targeting of the Yazidi community and the extensive coverage of their plight, this Note will use the Yazidis and ISIL as a case study for discussing and examining the broader problem of conflict-related sexual violence. This focus does not mean to ignore that sexual violence during this conflict has touched more than the Yazidi community, including individuals of different religions, nationalities, and even genders, though women still remain a significant portion of the survivors.<sup>6</sup>

Part II of this Note provides general background on the conflict in Iraq and Syria involving ISIL. In particular, Part II focuses on ISIL's system of sexual enslavement, its targeting of the Yazidi community, and how survivors are faring thus far. Part II also discusses the history of sexual violence in international law, including the international community's sluggish response to the issue of violence against women, both domestically and in the context of conflict. Because there is no treaty on violence against women, Part III explains how the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the leading international treaty on women's equal treatment, obligates states to prevent, investigate, punish, and ensure redress for acts of discrimination against women, including sexual and domestic violence. Part IV applies the CEDAW due-diligence framework to the situation in Iraq and discusses options for criminal accountability, such as the duty to investigate and punish, and options for reparations and other reforms, such as the duty to redress.

## II. BACKGROUND

### A. *ISIL in Iraq and Syria*

The “Islamic State” has become more famous in the last few years for its actions in Syria, Iraq, and beyond, but it has existed

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5. *Id.* ¶¶ 14–30.

6. See Heather Hurlburt & Jacqueline O'Neill, *We Need to Think Harder About Terrorism and Gender. ISIS Already Is*, VOX (June 1, 2017, 11:00 AM), <https://www.vox.com/the-big-idea/2017/6/1/15722746/terrorism-gender-women-manchester-isis-counterterrorism> [https://perma.cc/99DG-EJYK] (archived Aug. 26, 2018) (discussing ISIS's strategic use of gender dynamics to “build” their state and bond its fighters, such as the mass enslavement of minority women and reports of male-on-male rape, often videotaped for blackmail purposes).

under various names and shapes since the early 1990s.<sup>7</sup> It merged and interacted with various other Islamic insurgents in Iraq in the 2000s, but the “Islamic State” we know today came to power after the Syrian rebellion against Bashar al-Assad; at this point, the group’s leader, Abu Bakr al-Baghdadi, renamed it the Islamic State in Iraq and the Levant (ISIL).<sup>8</sup> ISIL began a campaign of expansion to cover 90,800 square kilometers of Syria and Iraq, including several major cities.<sup>9</sup>

In August 2014, ISIL’s territorial campaign expanded its territory to include the area around Mount Sinjar, home to a religious minority called the Yazidis.<sup>10</sup> The Yazidis are a small group of ethnic Kurds numbering around five hundred thousand people total.<sup>11</sup> They practice a syncretic, monotheistic religion with elements of Zoroastrianism, Mithraism, Mathdaism, and other local traditions.<sup>12</sup> Because of this blend of religious elements and misinterpretations of their religion, some Muslim populations have labeled the Yazidis as “devil worshippers” and have targeted them for persecution for several hundred years.<sup>13</sup> In the 1970s, for instance, Saddam Hussein’s Arabization programs forced Yazidis to leave their villages and to relocate in cities like Sinjar.<sup>14</sup>

In line with this tradition of persecution, ISIL’s treatment of the Yazidis has been particularly brutal. Upon capturing Yazidis, ISIL immediately separated the men and women, then executed the men and confined young, unmarried girls in schools, palaces, and various other municipal buildings in the cities.<sup>15</sup> From there, the girls and women became part of ISIL’s extensive, organized sex trade, which included slave markets.<sup>16</sup> Most scholars and journalists agree that

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7. Bobby Ghosh, *ISIS: A Short History*, THE ATLANTIC (Aug. 14, 2014), <https://www.theatlantic.com/international/archive/2014/08/isis-a-short-history/376030/> [https://perma.cc/W4WT-BLCK] (archived Aug. 26, 2018).

8. *Id.*

9. Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html> [https://perma.cc/JFL9-KKLR] (archived Aug. 26, 2018).

10. *Id.*

11. Avi Asher-Schapiro, *Who are the Yazidis, the Ancient, Persecuted Religious Minority Struggling to Survive in Iraq*, NAT’L GEOGRAPHIC NEWS (Aug. 11, 2014), <https://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isis-religion-history/> [https://perma.cc/83PT-SK6H] (archived Aug. 26, 2018).

12. *Id.*

13. *Id.*

14. *Id.*

15. Callimachi, *supra* note 9; see also Human Rights Council, “They Came to Destroy” ISIS Crimes Against the Yezidis, Rep. on the Work of Its Thirty-Second Session, ¶ 49, U.N. Doc. A/HRC/32/CRP.2, (June 15, 2016), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A\\_HRC\\_32\\_CRP.2\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf) [https://perma.cc/6XQK-RZFX] (archived Aug. 26, 2018) [hereinafter HRC Report].

16. See HRC Report, *supra* note 15, ¶ 55 (“ISIS sells Yazidi women and girls in slave markets, or souk sabaya, or as individual purchases to fighters who come to the

this widespread campaign of sexual enslavement was not implemented against other religious minorities, an idea later confirmed by ISIL's propaganda magazine.<sup>17</sup>

The Yazidis were intentionally targeted because they were not "People of the Book," like Jews and Christians, so could pay a tax known as *jizya* or *jizyah* to be set free.<sup>18</sup> To justify the human trafficking, ISIL cited specific verses in the Quran, as well as other religious writings that sanctioned slavery and provided detailed rules for the practice.<sup>19</sup> This "theology of rape" is exemplified by accounts of ISIL fighters kneeling to pray right before and after forcing themselves on young girls: in one telling example, a fighter took time to explain to his twelve-year-old victim that the Quran gave him the right to rape her and encouraged the act.<sup>20</sup> In the slave markets themselves, girls were observed and forced to answer intimate questions, including questions about their last menstrual cycle, in order to keep in line with a Shariah rule that men cannot have sex with a pregnant slave.<sup>21</sup>

Responsibility for the sexual violence extended beyond the buyers, fighters, and immediate perpetrators: to control and manage the nearly six thousand Yazidi women captured, ISIL's sex trade operated through an intricate bureaucracy of judges, government officials, and markets.<sup>22</sup> Institutions, like the courts set up and administered by ISIL, have provided religious justifications for

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holding centres. In some instances, an ISIS fighter might buy a group of Yazidi females in order to take them into rural areas without slave markets where he could sell them individually at a higher price."); Callimachi, *supra* note 9 (describing personal experiences from the Islamic State's slave trade).

17. See Callimachi, *supra* note 9 (stating that many community leaders, government officials, and academics believed that the Islamic State slave trade consisted solely of Yazidi females).

18. While Christians and Jews suffered attacks and persecution under ISIL rule, these groups retained the right to worship as long as they paid the tax. The focus on the Yazidis stems in part because, in contrast to Christians and Jews, Yazidis viewed as polytheists with an oral tradition rather than written scripture. See *id.* (finding that the Yazidi were more despised than the Christians and Jews because they have a written tradition); HRC Report, *supra* note 15, ¶ 154 (describing the ability of Jews and Christians to make a payment to avoid conversion or death).

19. Callimachi, *supra* note 9.

20. *Id.*

21. *Id.*

22. See *id.* (describing the judicial approval of the emancipation of a slave); HRC Report, *supra* note 15, ¶ 58 ("A central committee, the Committee for the Buying and Selling of Slaves, organises the Yazidi slave markets. Where the central committee authorizes the opening of a slave market in a particular town, it devolves some of its functions to a local committee and commander. An ISIS document, released online and judged to be authentic, informed fighters were required to pre-register if they wish to attend a slave market in Homs, and explained the procedure for buying: 'the bid is to be submitted in the sealed envelope at the time of purchase, and the one who wins the bid is obliged to purchase.'").

slavery as well as practical rules guiding slave transactions and treatment.<sup>23</sup> For example, courts drafted and approved sales contracts for slaves and occasionally provided documents known as “certificates of emancipation” that freed slaves.<sup>24</sup>

ISIL forbade brothers from transferring slaves to one another and ISIL fighters from transferring slaves to non-ISIL fighters—to keep in line with the justification of slaves as “spoils of war” and to prevent reselling a girl to her family.<sup>25</sup> Laws also provided for reversion, ensuring slaves were not freed if their owner died intestate but were instead returned to common ownership by ISIL who placed them on the market again.<sup>26</sup> As ISIL lost territory, the number of enslaved women dwindled, so ISIL imposed restrictions designed to stop Yazidi women from escaping, like requiring women to register in an electronic database checked at ISIL “border” checkpoints.<sup>27</sup>

Reports and testimony from survivors and escapees confirm the extensive physical, mental, and emotional abuse endured at the hands of ISIL, as well as the trauma that continues even after escape.<sup>28</sup> This trauma is compounded by the difficulties of living in camps and the grief of losing family members.<sup>29</sup> While all the captives experienced horrors, the women and girls who remained under ISIL control until the last year or two, such as those recently liberated with the city of Mosul, have displayed signs of severe psychological injury.<sup>30</sup> One Yazidi gynecologist, who has treated over a thousand of these rape victims, described them as “very tired,” “unconscious,” and “in severe shock and psychological upset.”<sup>31</sup> This shock, reportedly present in up to 90 percent of the women freed, is revealed frequently as severe lethargy: women and girls sleep for days and appear unable to wake up or sit up.<sup>32</sup> Some have shown signs of indoctrination, refusing to remove their face-covering *niqabs* and calling their ISIL husbands “martyrs.”<sup>33</sup> Even journalists and aid workers experienced

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23. See Callimachi, *supra* note 9; HRC Report, *supra* note 15.

24. Callimachi, *supra* note 9.

25. HRC Report, *supra* note 15, ¶¶ 75–76.

26. *Id.* ¶ 62.

27. Associated Press, *ISIS Tightens Grip on Scores of Female Sex Slaves*, CBS (July 5, 2016), <http://www.businessinsider.com/isis-is-tightening-its-grip-on-yazidi-women-and-children-forced-to-become-sex-slaves-2016-7> [https://perma.cc/S5M5-ZDHP] (archived Aug. 26, 2018).

28. See, e.g., Rothna Begum & Samer Muscati, *Interview: These Yazidi Girls Escaped ISIS. Now What?*, HUMAN RIGHTS WATCH (Apr. 15, 2015, 11:00 AM), <https://www.hrw.org/news/2015/04/15/interview-these-yezidi-girls-escaped-isis-now-what> [https://perma.cc/PP4A-ZVJ3] (archived Aug. 31, 2018).

29. *Id.*

30. *Id.*

31. Callimachi, *supra* note 9.

32. *Id.*

33. *Id.* (explaining that even though Yazidi women traditionally do not cover their faces, some victims refuse to remove their covers).

in treating these kinds of victims have noted that the abuse ISIL inflicted on the Yazidi women and girls is unlike anything they have seen before.<sup>34</sup>

Given the scope of ISIL's sexual violence and the lack of available resources, many victims have had to remain in camps, where mental health treatment is poor, and many women remain suicidal as a result of being unable to accept the amount of violence they have experienced.<sup>35</sup> Healthcare experts and advocates say there are not enough resources to provide the necessary long-term care for these survivors.<sup>36</sup> There is also concern in the community about abducted women and their families facing ostracism as a result of the stigma attached to the loss of virginity.<sup>37</sup> However, some reports, which will be discussed in a later subpart, indicate Yazidi leaders have made an effort to welcome back female relatives.<sup>38</sup>

### B. History of Sexual Violence and International Law

#### 1. Origins

Wherever and whenever there is war, there is sexual violence.<sup>39</sup> Even as "rules" of armed conflict have existed and developed over time, the maxim "to the victor goes the spoils" results in the widespread acceptance of rape as socially acceptable conduct and a proper reward for those victorious in war.<sup>40</sup> The first known formal international trial for violations of the rules of war occurred in 1474, when a native of Alsace, France, Sir Peter Hagenbach, was accused and convicted of inflicting "a reign of terror" in the town of Breisach without declaring war.<sup>41</sup> Because he had not formally brought the

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34. See Alexandra Bradford, *Freed from ISIS, Yazidi Women Remain Trapped by Trauma*, NEWS DEEPLY (Mar. 14, 2017), <https://www.newsdeeply.com/womenand-girls/articles/2017/03/14/freed-isis-yazidi-women-remain-trapped-trauma> [https://perma.cc/8W2G-RHFD] (archived Aug. 31, 2018) ("It is some of the most distressing work I have ever done, and my colleagues who have also interviewed the survivors say that same thing."); Jomana Karadsheh & Chris Jackson, *Fighting to Bring ISIS to Justice for War Crimes against Yazidis*, CNN (Oct. 11, 2017), <http://www.cnn.com/2017/10/11/middleeast/isis-yazidi-war-crimes-tribunal-investigation/index.html> [https://perma.cc/U4BW-5727] (archived Aug. 31, 2018) ("In creativity they are absolutely unique, the throwing of homosexuals or suspected homosexuals off tall buildings, sexual slavery in an organized way.").

35. Bradford, *supra* note 34.

36. *Id.*

37. Begum & Muscati, *supra* note 28.

38. *Id.*

39. KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 1 (1997).

40. *Id.* at 21.

41. *Id.* at 29.

rules of war into play, the court reasoned, Hagenbach was convicted for certain abuses committed by his troops, including rape.<sup>42</sup>

Over the next few centuries, some voices began decrying wartime sexual assault,<sup>43</sup> and rape was eventually prohibited in Article 44 of the 1863 Lieber Code and the Hague Regulations respecting the Laws and Customs of War on Land.<sup>44</sup>

Still, rape and other sexual crimes have rarely been punished in war tribunals.<sup>45</sup> This includes the landmark International Military Tribunal (IMT) at Nuremberg: despite ample evidence of tortuous rape, forced prostitution, forced sterilization, forced abortion, and other heinous sexual crimes,<sup>46</sup> rape was subsumed under more general headings, such as “other inhumane acts committed against any civilian population.” These headings themselves were within the generic category of crimes against humanity.<sup>47</sup>

Sexual violence played a slightly larger role in the prosecution of Japanese leaders after World War II, in part because of the publicized horrors of Japan’s military conquest of China—epitomized by the “rape of Nanking” in which approximately two hundred thousand women suffered sexual violence.<sup>48</sup> The indictments in the IMT for the Far East charged some Japanese defendants with rape and actually did prosecute rape successfully, though secondarily under prohibitions against “inhumane treatment,” “ill-treatment,” and “failure to respect family honour and rights.”<sup>49</sup>

Overall, crimes of sexual violence in World War II went largely unprosecuted, and similar crimes in subsequent conflicts went unprosecuted on an international level for nearly the next fifty years.<sup>50</sup> This legacy of neglecting sexual violence is evident and ripe

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42. *Id.*

43. *See id.* at 29–30 (describing how some early scholars and organizers of international law such as Hugo Grotius recognized rape in war should be punished just as much as rape in peacetime).

44. Stefan Kirchner, *Wartime Rape in the Congo*, in *CRIMES AGAINST WOMEN* 81, 85 (David Wingeate Pike ed., 2011).

45. ASKIN, *supra* note 39, at 32, 41–45 (describing post World War I recognition and documentation of “unparalleled” pillage and sexual assault by the Germans, though ultimately efforts to prosecute the war criminals on the basis of these war crimes failed).

46. *Id.* at 97.

47. *Id.* at 131; *see also* Rhonda Copelon, *Toward Accountability for Violence Against Women in War: Progress and Challenges*, in *SEXUAL VIOLENCE IN CONFLICT ZONES* 232, 235 (Elizabeth D. Heineman ed., 2011) [hereinafter Copelon I] (attributing the failure to prosecute rape officially in part to a reluctance to confront acts that some Allied troops also committed).

48. Copelon I, *supra* note 47, at 236.

49. ASKIN, *supra* note 39, at 180.

50. Megan Nobert, *Creating International Responsibility: The Non-Prosecution of Sexual Violence Post Conflict as a Violation of Women’s Rights*, 17 *TILLBURG L. REV.* 63, 73 (2012).



in international relations even today. For example, recognition of the sexual abuse and slavery suffered by “comfort women”<sup>51</sup> during World War II remained elusive for decades. There are still tensions between South Korea and Japan over the issue: within the last year there was some dispute concerning the sufficiency of a 2015 agreement, in which Japan officially apologized and agreed to pay compensation to elderly victims.<sup>52</sup>

After the World War II tribunals, international law slowly recognized the specific criminality of sexual violence in both domestic and conflict settings, including in the four Geneva Conventions and their accompanying protocols.<sup>53</sup> The language of the Fourth Geneva Convention of 1949 specifically prohibits rape and forced prostitution: “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>54</sup> Within the larger context of the Geneva Conventions, however, these prohibitions may be viewed as rather weak: rape was not listed as a crime under the category of “grave breaches,” or the most serious crimes carrying an obligation to prosecute.<sup>55</sup> Rather, the Geneva Convention treats rape and sexualized violence as subject to domestic discretion and not an area for international concern.<sup>56</sup> The 1977 Protocols enlarged the prohibitions and used more expansive language regarding attacks on personal dignity but also did not explicitly recognize sexualized

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51. Comfort women is the term for the approximately 200,000 women and young girls whom the Japanese army abducted from the Korean peninsula and other areas. They were placed in brothels near the borders in World War II and forced to have sex with potentially dozens of men daily. Only a few dozen identified comfort women are still alive. See, e.g., “*Comfort Women Memorial Statues, a Thorn in Japan’s Side, Now Sit on Korean Buses*,” NPR (Nov. 13, 2017), <https://www.npr.org/sections/parallels/2017/11/13/563838610/comfort-woman-memorial-statues-a-thorn-in-japans-side-now-sit-on-korean-buses> [https://perma.cc/G7NP-8LR5] (archived Aug. 31, 2018).

52. See David Wingeate Pike, *Imperial Japan and its “Comfort Women”*, in CRIMES AGAINST WOMEN, *supra* note 44, at 9, 89 (describing how Japan managed to evade responsibility and insisted for decades that no proof existed the military had enslaved women in brothels during World War II); *Japan and South Korea agree WW2 ‘comfort women’ deal*, BBC (Dec. 28, 2015), <http://www.bbc.com/news/world-asia-35188135> [https://perma.cc/JW5L-P5CD] (archived Aug. 31, 2018); Ilaria Maria Sala, *Why Is the Plight of “Comfort Women” Still So Controversial?*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/opinion/comfort-women-japan-south-korea.html> [https://perma.cc/T2S8-2G9D] (archived Aug. 31, 2018).

53. See Eileen Servidio, *Rape and Other Sexual Violence against Women and Girls in Armed Conflict: A Legal Look at the Issues*, in CRIMES AGAINST WOMEN, *supra* note 44, at 54.

54. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949, 76 U.S.T. 3316, 5 U.N.T.S. 287.

55. Copelon I, *supra* note 47, at 236.

56. *Id.*

violence as a “grave breach.”<sup>57</sup> Some scholars have noted that the lack of urgency and importance regarding sexual violence in international law unfortunately mirrors the domestic treatment of rape as a moral and “private” matter, rather than a violent crime warranting prosecution.<sup>58</sup>

## 2. 1990s—Women’s Rights Emerge as International Priority

The 1990s brought greater recognition of the issue of gender-based violence and sexual violence in war. In the 1990s, the UN Security Council established two *ad hoc* International Criminal Tribunals, one for the Former Yugoslavia (ICTY) in 1993 and one for Rwanda (ICTR) in 1994, to prosecute atrocities and war crimes occurring during the Balkan conflicts of the 1990s and the Rwandan genocide of 1994.<sup>59</sup> The UN estimates that during the three months of the 1994 Rwanda genocide, between 100,000 and 250,000 women were raped. Rape estimates for the conflict in the former Yugoslavia range up to sixty thousand, with other conflicts marking similarly high numbers.<sup>60</sup> These tribunals were established in part due to pressure from increasingly organized and vocal feminist and women’s human rights campaigns, including the 1993 World Conference on Human Rights in Vienna.<sup>61</sup> The subsequent historic *Vienna Declaration and Programme of Action* condemned gender violence and made specific mention of violations of women’s rights in armed conflict as needing an especially effective response.<sup>62</sup> Shortly after, the 1995 World Conference on Women in Beijing also focused on violence against women as a critical issue, and over 180 governments affirmed the resulting 1995 Beijing Declaration.<sup>63</sup>

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57. *Id.* at 237.

58. *Id.* at 237–38.

59. *Id.* at 242.

60. See, e.g., *Background Information on Sexual Violence Used as a Tool of War*, OUTREACH PROGRAMME ON THE RWANDA GENOCIDE & THE U.N., <http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml> (last visited Oct. 11, 2018) [<https://perma.cc/VNU7-TRZQ>] (archived Aug. 31, 2018) (providing UN estimates for rape in conflicts in former Yugoslavia, Rwanda, Sierra Leone, Liberia, and Democratic Republic of Congo).

61. See Copelon I, *supra* note 47, at 240–41 (describing the Vienna Conference as a “watershed for the establishment of women’s human rights internationally”); Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *WOMEN’S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 197, 198 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter Copelon II] (describing how the issue of rape in Bosnia emerged at the same time as a greater global feminist movement, as displayed at the 1993 Vienna Conference, gained traction).

62. Copelon I, *supra* note 47, at 240–41; Copelon II, *supra* note 61, at 198.

63. Mala Htun & S. Laurel Weldon, *The Civic Origins of Progressive Policy Change: Combating Violence Against Women in Global Perspective, 1975-2000*, 106 AM. POL. SCI. REV. 548, 556 (2012).

Adopted in May 1993, Article 5 of the ICTY Statute marked the first time rape was independently acknowledged as a crime against humanity.<sup>64</sup> The ICTR Statute, approved in November 1994, improved upon the ICTY by adding rape, enforced prostitution, and any form of indecent assault as war crimes; however, such crimes were still considered to fall under “outrages against personal dignity” instead of the more forceful category of violence to the person.<sup>65</sup>

Still, the judgments and other procedures stemming from these tribunals became the foundation upon which accountability for wartime sexual violence and other gender crimes was built.<sup>66</sup> Feminist and women’s rights organizations helped shape both tribunals’ Rules of Evidence and Procedure, which stressed the need to support victims, protect witnesses, and remove the traditional sexism accompanying sexual crime prosecutions.<sup>67</sup> For example, Rule 96 of the Rules of Procedure and Evidence for the ICTY was progressive in recognizing the coercive nature of rape and precluding a defense argument of consent in a sexual assault case if the victim was threatened with or subjected to violence or duress, or reasonably believed refusal would subject another to violence.<sup>68</sup>

After prosecutors were pressured to include rape and sexual violence crimes in the ICTR indictments, the *Akayesu* Judgment in the ICTR established that rape, defined as a “physical invasion of a sexual nature,” constituted an act of genocide.<sup>69</sup> The *Akayesu* judgment also specifically found sexual violence was a “step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to life, and of life itself.”<sup>70</sup> The judgment’s definition of sexual assault was later confirmed in other ICTY cases and judgments,<sup>71</sup> which recognized rape and sexualized violence against women as war crimes and crimes against humanity.<sup>72</sup> In particular, the *Kunarac* Appeal Judgment expanded these cases’ definition of sexual assault and stated that under international law, the court must consider that other factors besides force or use of threat could render an act of

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64. Susan H. Shin, *Justice Delayed: Accountability in the “Comfort Women” Case*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 413, 426 (Jane E. Stromseth ed., 2003).

65. Copelon I, *supra* note 47, at 242–43.

66. *Id.* at 244.

67. *Id.* at 243.

68. ASKIN, *supra* note 39, at 303.

69. Copelon I, *supra* note 47, at 244–45.

70. *Id.* at 245.

71. See Nobert, *supra* note 50, at 74 (citing Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgment, (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001)) (expanding on Akayesu’s definition of sexual violence).

72. Copelon I, *supra* note 47, at 246.

sexual penetration nonconsensual.<sup>73</sup> It also held rape always satisfies the first element of torture, infliction of severe physical or mental suffering, and rape was a tool of ethnic discrimination.<sup>74</sup> A later case, *The Prosecutor v. Mikaeli Muhimana*, further broadened the coercive circumstances constituting sexual violence during conflict by finding that coercion was implicit in the conditions of sexual assault during conflicts.<sup>75</sup>

Another major international criminal justice development in the 1990s, and one influenced by feminist and women's groups, was the establishment of a permanent International Criminal Court (ICC) via treaty, the Rome Statute.<sup>76</sup> Although there was initial support after both world wars, a permanent ICC remained elusive until the dissolution of Cold War tensions in the late 1980s and early 1990s.<sup>77</sup> By then, with the ongoing conflicts and tribunals in Yugoslavia and Rwanda, the UN called for a draft statute for a permanent ICC, which emerged in the form of the Rome Statute, passed in 1998.<sup>78</sup> While women's advocates and groups participated in the Rome talks and recommended a number of proposals regarding gender-based violence, the Rome Statute was only a partial success.<sup>79</sup> Scholars have applauded the Statute for disassociating sexual violence from outrages on personal dignity, listing gender-based crimes in a separate paragraph from general crimes against humanity, specifically including sexual slavery in its definition of crimes against humanity, and naming gender as one of the impermissible grounds for persecution.<sup>80</sup> However, the Rome Statute failed in several aspects: qualifying sexual violence and gender-based persecution on "gravity," and requiring acts constituting crimes against humanity be part of a widespread or systematic attack.<sup>81</sup> These and other issues, which are discussed below, preclude effective prosecution of gender-based crimes in the ICC and other courts.

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73. See Nobert, *supra* note 50, at 75.

74. Copelon I, *supra* note 47, at 246.

75. See *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶¶ 544–47 (Apr. 28, 2005) (“[T]his Chamber concurs with the opinion that circumstances prevailing in most cases charged under international criminal law, as either genocide, crimes against humanity, or war crimes, will be almost universally coercive, thus vitiating true consent.”); Nobert, *supra* note 50, at 76.

76. Brook Sari Moshan, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 *FORDHAM INT'L L.J.* 154, 154–55 (1998).

77. *Id.* at 165, 167–68.

78. *Id.* at 169–70.

79. *Id.* at 180.

80. *Id.* at 180–82.

81. *Id.* at 182–83.

### C. International Efforts to Combat Conflict-Related Sexual Violence

While international law has increasingly has focused its attention on women's rights and violence against women due to the advocacy movements of the 1990s, scholars and activists have also called for more attention to be paid to the increased vulnerability of women during and after armed conflict situations.<sup>82</sup> As such, conflict-related sexual violence has been the focus of considerable soft law in recent years as an offshoot of the greater focus on gender-based violence.<sup>83</sup> Conflict-related sexual violence refers to "incidents or patterns of sexual violence against women, men, girls or boys occurring in a conflict or post-conflict setting that have direct or indirect links with the conflict itself or that occur in other situations of concern such as in the context of political repression."<sup>84</sup> This definition encompasses "rape, forced pregnancy, forced sterilization, forced abortion, forced prostitution, sexual exploitation, trafficking, sexual enslavement, forced circumcision, castration, forced nudity, or any other serious form of sexual violence."<sup>85</sup>

Various United Nations Security Council resolutions have expounded upon these conventions and protocols to address conflict-related sexual violence and broader security goals concerning women and girls.<sup>86</sup> For example, United Nations Security Council Resolution 1325 introduced the Women, Peace, and Security Agenda, marking a much-needed acknowledgment of how women and children in particular "account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons."<sup>87</sup> The resolution's four broad pillars of priority action include participation, protection, prevention, and relief and

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82. Press Release, Security Council, Women Suffer Disproportionately During and After War, Security Council Told During Day-Long Debate on Women, Peace and Security, U.N. Press Release SC/7908 (Oct. 29, 2003); Daniela Nadj, *Sexual violence is a widespread weapon of war—it's time international law caught up*, INDEPENDENT (Nov. 10, 2018), <https://www.independent.co.uk/news/world/politics/sexual-violence-women-war-feminism-gender-isis-yazidi-boko-haram-nobel-peace-prize-a8595736.html> [<https://perma.cc/9RY8-S6WK>] (archived Nov. 26, 2018).

83. See Catherine O'Rourke & Aisling Swaine, *CEDAW and the Security Council: Enhancing Women's Rights in Conflict*, 67 INT'L & COMP. L.Q. 167, 167–68 (2018) (describing several committees and resolutions addressing women's rights in armed conflict areas).

84. U.N. Secretary-General, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, at 2 (June 2014), <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf> [<https://perma.cc/ZBZ4-68BC>] (archived Aug. 31, 2018) [hereinafter Reparations Guidance Note].

85. *Id.* at 2–3.

86. OHCHR UNAMI Report, *supra* note 3, ¶ 14.

87. See generally S.C. Res. 1325 (Oct. 31, 2000).

recovery.<sup>88</sup> The resolution also contains language specifically calling on all parties to armed conflict to protect women and girls from gender-based violence and reiterating the need to prosecute those who commit crimes in conflict situations.<sup>89</sup>

In June 2008, the United Nations Security Council adopted Resolution 1820, which recognized and condemned rape as a war tactic.<sup>90</sup> Using especially strong language, this resolution stresses that wartime rape as a military strategy constitutes a threat to international peace and security,<sup>91</sup> recognizes sexual violence as a breach of international law, and emphasizes the need to exclude sexual violence amnesty provisions in the context of conflict resolution processes.<sup>92</sup> Other resolutions such as 1888 (2009),<sup>93</sup> 1889 (2009),<sup>94</sup> 1960 (2010),<sup>95</sup> 2106 (2013),<sup>96</sup> and 2122 (2013)<sup>97</sup> have similarly addressed conflict-related sexual violence and the unique needs of women and girls in conflict and post-conflict conditions.<sup>98</sup> Although these are positive developments, the Security Council's focus has remained limited to sexual violence as a tactic in war rather than the broader issue of gender-based violence, as other UN bodies have addressed.<sup>99</sup>

The UN and its human-rights-focused agencies have also recognized that the international community needs to pay more attention to conflict-related sexual violence, gender-based violence,

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88. See, e.g., WOMEN WATER, U.N. STRATEGIC RESULTS FRAMEWORK ON WOMEN, PEACE AND SECURITY: 2011–2020 (July 2011), [http://www.un.org/womenwatch/ianwge/taskforces/wps/Strategic\\_Framework\\_2011-2020.pdf](http://www.un.org/womenwatch/ianwge/taskforces/wps/Strategic_Framework_2011-2020.pdf) [<https://perma.cc/3VH4-5GJQ>] (archived Aug. 31, 2018).

89. S.C. Res. 1325, *supra* note 87, ¶¶ 10–11.

90. See S.C. Res. 1820, ¶ 1 (June 19, 2008) (taking steps to address widespread sexual violence).

91. *Id.*

92. *Id.* ¶ 4; Sahla Aroussi, 'Women, Peace, and Security': Addressing Accountability for Wartime Violence, 13 INT'L FEMINIST J. POL. 576, 581 (2011) (describing the firmer position of the Security Council on the issue of accountability for gender-based violence by expressing in its operative paragraphs its readiness to take measures).

93. See generally S.C. Res. 1888 (Sept. 30, 2009) (mandating peacekeeping missions to protect women and girls from sexual violence in armed conflict).

94. See generally S.C. Res. 1889 (Oct. 5, 2009) (urging additional measures to improve women's participation in peace processes and discussing the key role women can play in post-conflict societies).

95. See generally S.C. Res. 1960 (Dec. 16, 2010) (responding to the "slow" progress and providing an accountability system for combating conflict-related sexual violence).

96. See generally S.C. Res. 2106 (Jun. 24, 2013) (focusing on ending impunity for perpetrators of sexual violence against both women and men).

97. See generally S.C. Res. 2122 (Oct. 18, 2013) (focusing on strengthening the role of women in various stages of conflict prevention and resolution).

98. OHCHR UNAMI Report, *supra* note 3, ¶ 14.

99. O'Rourke & Swaine, *supra* note 83, at 191.

and transitional justice in post-conflict settings.<sup>100</sup> A 2014 report from the Office of the United Nations High Commissioner for Human Rights that focused on gender-based and sexual violence in relation to transitional justice stressed the need to incorporate gender-based and sexual violence into the work of post-conflict truth-seeking processes like truth commissions.<sup>101</sup> The report also highlighted the importance of women's participation to ensure adequate redress for violations and proper reform.<sup>102</sup> In 2016, the Security Council adopted Resolution 2331, which expressly condemned all acts of trafficking, particularly "the sale or trade in persons undertaken by the 'Islamic State of Iraq and the Levant,'" including of Yazidis and other minority members, and recognized the importance of "collecting and preserving evidence relating to such acts in order to ensure that those responsible can be held accountable."<sup>103</sup>

These developments reflect how the international community, led by the UN, has been increasingly willing to discuss and label sexual violence at the level of war crimes and crimes against humanity.<sup>104</sup> These expansive definitions mark a rhetorical shift towards condemning sexual violence, though in practice actual prevention and solutions are harder to implement.

### III. CEDAW AS A FRAMEWORK FOR VIOLENCE AGAINST WOMEN

#### A. *History of CEDAW*

While the above-mentioned sources have been important in the development of human rights, CEDAW stands out as one of the key sources of international human rights law targeting the unequal treatment of women.<sup>105</sup> Adopted in 1979, CEDAW is one of the most widely ratified human rights treaties, with 189 parties.<sup>106</sup> It was adopted, in part, as an acknowledgement that the "mainstream" human rights instruments and framework were inadequate to guard

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100. See generally Office of the U.N. High Comm'r for Human Rights, Analytical Study Focusing on Gender-Based and Sexual Violence in Relation to Transitional Justice, Rep. on the Work of Its Twenty-Seventh Session, U.N. Doc. A/HRC/27/21 (2014).

101. *Id.* at 7.

102. *Id.* at 4.

103. S.C. Res. 2331, ¶ 11 (Dec. 20, 2016).

104. *Id.* ¶¶ 8, 10.

105. *Status of Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#top](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#top) (last visited Oct. 11, 2018) [perma.cc/SC36-QLBL] (archived Aug. 24, 2018) [hereinafter CEDAW Status].

106. *Id.*

and promote the rights of women.<sup>107</sup> CEDAW contains the following definition of discrimination against women:

[A]ny distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>108</sup>

The treaty requires states to condemn discrimination in all its forms and to undertake a number of actions including: embedding gender equality in national constitutions, forbidding discriminating against women through appropriate legislation, establishing institutional legal protections of the equal rights of women, and generally taking all appropriate measures to eliminate discrimination against women by any person or enterprise.<sup>109</sup> In Article 5, one of the most controversial and far-reaching provisions, the CEDAW Convention calls on states to “take all appropriate measures to modify social and cultural patterns of conduct” in order to eliminate prejudices, customs, and stereotyped ideas of the superiority or inferiority of genders.<sup>110</sup> The other duties listed in CEDAW span many aspects of life, private and public, from family to workplace to government.<sup>111</sup>

The treaty establishes a system of accountability for the enumerated list of rights by establishing an independent committee of experts who undertake a periodic review of state compliance.<sup>112</sup> Beyond the normal reporting procedures, the CEDAW Committee may, on an “exceptional” basis under Article 18, request a state party provide a report on potential violations of particular concern.<sup>113</sup> In 2000, the Optional Protocol to the Convention entered force, creating an individual communications mechanism and an inquiry procedure for “grave or systematic violations” of the Convention.<sup>114</sup> These procedures remain limited to state parties who have ratified the

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107. O'Rourke & Swaine, *supra* note 83, at 173.

108. Convention on the Elimination of All Forms of Discrimination Against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 [hereinafter CEDAW].

109. *Id.* art. 2.

110. *Id.* art. 5.

111. Elizabeth Friedman, *Women's Human Rights: The Emergence of a Movement*, in *WOMEN'S RIGHTS HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 18, 23 (Julie Peters & Andrea Wolper eds., 1995).

112. CEDAW, *supra* note 108, art. 17–18.

113. O'Rourke & Swaine, *supra* note 83, at 181.

114. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, art. 8, Oct. 6, 1999, A/RES/54/4 [hereinafter CEDAW Optional Protocol].



Optional Protocol and chosen not to opt out of the latter procedure; as of early 2018, this number was limited to about 109 parties.<sup>115</sup>

There are further limitations on the CEDAW Committee's reach and potential for real accountability. First, CEDAW only applies to state parties to the Convention—the United States is not a party, for example.<sup>116</sup> Second, the result of so many state parties signing onto CEDAW is the large amount of reservations; CEDAW is one of the human rights treaties with the highest number of reservations.<sup>117</sup> Iraq has made several substantive reservations to the CEDAW Convention, concerning measures such as modifying existing laws and/or customs, repealing national penal provisions, and ensuring equality of men and women in matters relating to marriage and family.<sup>118</sup> In submitting a reservation to the last of these provisions, Iraq joined a number of Islamic countries in reserving an Islamic Shariah law exception.<sup>119</sup> Other accountability issues arise from the fact that CEDAW's application is limited to states, and, in the conflict context, the fact that the Committee's general recommendations regarding conflict-related sexual violence are soft law and are therefore only persuasive, not binding, under international law.<sup>120</sup>

Still, some studies have found CEDAW to be more successful than other human rights treaties in producing a statistically significant positive effect on human rights.<sup>121</sup> For example, some studies find a general connection between CEDAW commitment and higher levels of female life expectancy and female literacy.<sup>122</sup> Some scholars, such as Beth Simmons, have attributed the impact of human rights treaties like CEDAW not to the direct relationship with states, but with the organizing framework the CEDAW Committee

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115. O'Rourke & Swaine, *supra* note 83, at 174; *Status of Optional Protocol to Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en) (last visited Oct. 11, 2018) [<https://perma.cc/G8GL-CKEB>] (archived Aug. 31, 2018).

116. O'Rourke & Swaine, *supra* note 83, at 174.

117. *Id.* at 175.

118. See CEDAW Status, *supra* note 105 (listing Iraq's reservations to articles 2, 16, and 29 of CEDAW).

119. See *id.* ("The reservation to this last-mentioned article shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them.")

120. O'Rourke & Swaine, *supra* note 83, at 175.

121. *Id.* at 183 (citing NA Englehart & MK Miller, *The CEDAW Effect: International Law's Impact on Women's Rights*, 13 J. HUM. RTS. 22 (2014)).

122. Kevin L. Cope & Cossette D. Creamer, *Disaggregating the Human Rights Treaty Regime*, 56 VA. J. INT'L L. 459, 467 (2016) (citing Mark M. Gray, Miki Caul Kittilson & Wayne Sandholtz, *Women and Globalization: A Study of 180 Countries, 1975-2000*, 60 INT'L ORG. 293 (2006)).

can provide to those seeking domestic reform.<sup>123</sup> In some areas, like females' access to education, CEDAW's ability to improve was more statistically significant in transitional countries than in stable autocracies or stable democracies;<sup>124</sup> sometimes the level of democracy in a certain year had no apparent impact on gender ratios in schools, while the presence of active international women NGOs did have an association with greater female enrollment ratios.<sup>125</sup> Essentially, CEDAW has little effect unless there are conditions for women to mobilize politically in the country.<sup>126</sup> In line with Simmons's hypothesis, other scholars have found mere ratification of CEDAW does not seem to have any effect on specific areas of concern like violence against women.<sup>127</sup>

### B. CEDAW's Incorporation of Violence against Women

The CEDAW Convention, notably, does not mention armed conflict, war, or violence anywhere in its text, unlike other human rights treaties like the Convention on the Rights of the Child.<sup>128</sup> It also does not explicitly delineate the right to remedies, reparation, and compensation.<sup>129</sup>

Given this gap, in recent years the treaty's monitoring body, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has made a point to clarify that CEDAW prohibits gender-based violence broadly as a form of discrimination.<sup>130</sup> In General Recommendation Number 19, the CEDAW Committee explicitly included gender-based violence—defined as violence that is directed against a woman because she is a woman or that affects women disproportionately—within the definition of discrimination in Article 1.<sup>131</sup> This recommendation stated such violence may breach provisions of CEDAW, regardless of an explicit mention of violence in the treaty provision.<sup>132</sup> While

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123. BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 126 (2009).

124. *Id.* at 217.

125. *Id.* at 221–22.

126. *Id.* at 254–55 (“Where they have both the motive and the means to use international law to improve their rights chances, the CEDAW has proved to be a powerful tool in their hands.”).

127. Htun & Weldon, *supra* note 63, at 561.

128. Convention on the Rights of the Child, art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3.; CEDAW, *supra* note 108.

129. Fionnuala Ni Aolain, Catherine O'Rourke & Aisling Swaine, *Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice*, 28 HARV. HUM. RTS. J. 97, 115 (2015).

130. Comm. on the Elimination of Discrimination Against Women, Violence Against Women, General Recommendation No. 19, ¶ 6, U.N. Doc. A/47/38 (1992).

131. *Id.*

132. *Id.*

reparations also were not explicitly mentioned, the CEDAW Committee recommended “effective complaints procedures and remedies, including compensation, should be provided” and stated states may also be “responsible for private acts if they fail to act with *due diligence* to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”<sup>133</sup> General Recommendation Number 28 confirmed that states’ obligations are not lessened in an armed conflict situation.<sup>134</sup>

The most explicit and influential statement on women’s human rights in the conflict context is the CEDAW Committee’s General Recommendation Number 30.<sup>135</sup> Stressing the special need for human rights protection in conflict situations,<sup>136</sup> this recommendation discusses state responsibility for nonstate actors under the CEDAW Convention.<sup>137</sup> States are required “to regulate non-State actors under the duty to protect, such that States must exercise due diligence to prevent, investigate, punish and ensure redress for the acts of private individuals or entities that impair the rights enshrined in the Convention.”<sup>138</sup> The recommendation also aims to connect the obligations of CEDAW with the framework of the Women, Peace, and Security Agenda (WPS Agenda) set out in UN Security Council Resolution 1325 and subsequent resolutions,<sup>139</sup> for instance, state parties are supposed to provide reports on compliance with the goals and benchmarks of the WPS Agenda.<sup>140</sup> The CEDAW Committee also makes it clear that nonstate actors, while not parties to the Convention, may be required to respect international human rights, especially when such actors have an identifiable political structure and exercise territorial control.<sup>141</sup> This position supports the compatibility and interaction of international criminal law and the

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133. *Id.* ¶¶ 9, 24 (emphasis added).

134. *See* Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28, ¶ 11, U.N. Doc. C/2010/47/GC.2 (2010) (“The obligations of States parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters.”).

135. *See generally* Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 30, U.N. Doc. CEDAW/C/GC/30 (Nov. 1, 2013) [hereinafter General Recommendation 30].

136. *Id.* ¶ 2.

137. *Id.* ¶¶ 10, 12.

138. *Id.* ¶ 15.

139. O’Rourke & Swaine, *supra* note 83, at 194 (“GR30 is inter alia an effort to give retrospective legal status to the UNSC resolution 1325 and its successors.”).

140. *See* General Recommendation 30, *supra* note 135, ¶ 84 (“States parties are to provide information on the implementation of the Security Council agenda on women, peace and security, in particular resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013), including by specifically reporting on compliance with any agreed United Nations benchmarks or indicators developed as part of that agenda.”).

141. *Id.* ¶ 16.

Convention's obligations,<sup>142</sup> as the Committee emphasizes that gross violations of human rights and humanitarian law may lead to individual criminal responsibility.<sup>143</sup> This is an example of the CEDAW Committee's interpretive role, namely its ability to influence the normative development of international human rights law through its interpretations of the treaty and connections with other human rights soft law.<sup>144</sup>

These kinds of soft law documents demonstrate how, despite the its weaknesses, CEDAW remains an important tool for accountability of violence against women in peacetime and wartime—especially as long as an issue-specific treaty on violence against women does not exist.<sup>145</sup> The CEDAW Committee's periodic compliance review has brought to light post-conflict women's rights issues, such as democratic representation of women in post-conflict governments,<sup>146</sup> involvement of women in peace or transition processes,<sup>147</sup> and how conflict affects substantive nondiscrimination rights.<sup>148</sup> The CEDAW Committee can use this compliance review, as well as soft law statements and special "exceptional" requests for state reports under Article 18, to bring attention to specific cases of concern, including conflict-related sexual violence.<sup>149</sup> As scholars have noted, these special reports have usually been requested of states who are experiencing or recently experienced conflicts; the first request in 1995 to countries in the former Yugoslavia asked for reports

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142. *See id.* ¶ 23 (stating that states parties' obligations to prevent, investigate, and punish sexual violence are reinforced by international criminal law, in which enslavement, rape, and other crimes of sexual violence may qualify as a war crime, crime against humanity, or act of genocide).

143. *Id.* ¶ 16.

144. O'Rourke & Swaine, *supra* note 83, at 182.

145. *Id.*

146. *See id.* at 180 (citing Comm. for the Elimination of All Forms of Discrimination Against Women, Concluding Observations to Serbia, U.N. Doc. CEDAW/C/SCG/CO/1 (June 11, 2007); Comm. for the Elimination of All Forms of Discrimination Against Women, Concluding Observations to Rwanda, U.N. Doc. CEDAW/C/RWA/CO/6 (Feb. 12, 2009)).

147. *See id.* (citing Comm. for the Elimination of All Forms of Discrimination Against Women, Concluding Observations to Israel, ¶ 22, U.N. Doc. CEDAW/C/ISR/CO/3 (Aug. 3, 2005); Comm. for the Elimination of All Forms of Discrimination Against Women, Concluding Observation to Cyprus, ¶ 270, U.N. Doc. CEDAW/C/CYP/CO/5 (June 13, 2006)).

148. *See id.* (citing Comm. for the Elimination of All Forms of Discrimination Against Women, Concluding Observations to Sierra Leone, ¶ 30, U.N. Doc. CEDAW/C/SLE/CO/5 (June 11, 2007); Comm. for the Elimination of All Forms of Discrimination against Women, Concluding Observations to Colombia, ¶ 30, U.N. Doc. CEDAW/C/COL/CO/6 (Feb. 20, 2007); Comm. for the Elimination of All Forms of Discrimination against Women, Concluding Observations to Liberia, U.N. Doc. CEDAW/C/LBR/CO/6 (Aug. 14, 2009)).

149. *See id.* at 181 (describing how these "monitoring-plus" activities help bolster periodic reporting procedures).

regarding acts of violence against women and girls during the conflict, specifically including the act of rape as a weapon of war.<sup>150</sup>

This kind of CEDAW Committee activity, while sometimes nonbinding, has serious symbolic and practical value.<sup>151</sup> As will be discussed below, the CEDAW Committee's work forms the backdrop for more substantive standards and frameworks like due diligence.

### C. Due Diligence

The due diligence standard is a long-established standard in international law, and provides a means for determining whether a state has breached one of its primary obligations under international law.<sup>152</sup> One of the first and strongest invocations of the standard in the context of human rights was *Velásquez Rodríguez v. Honduras*, a 1988 case from the Inter-American Court of Human Rights involving a disappearance, likely at the hands of state officials. The court held Honduras failed to fulfill its obligations under the American Convention on Human Rights:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.<sup>153</sup>

Regional courts, like the European Court of Human Rights,<sup>154</sup> as well as other human rights treaty monitoring bodies, have reflected or used parallel reasoning to *Velásquez* to find positive obligations to

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150. *Id.*

151. *Id.* at 181–82 (“In symbolic terms, the request highlights international awareness and concern with the gender-specific impact of conflict on women’s rights in particular conflict settings. In practical terms, the request requires State parties to gather further information, data and evidence concerning the gender-specific impact of conflict, which can in turn usefully support local women’s movements in seeking amelioration and redress for the most exigent effects of conflict on women.”).

152. Joanna Bourke-Martignoni, *The History and Development of the Due Diligence Standard in International Law and its Role in the Protection of Women against Violence*, in DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE 48–50 (Carin Benninger-Budel ed., 2008).

153. *Velásquez Rodríguez v. Honduras*, Case 7920, Judgment, Inter-Am. Comm’n H.R., Report No. 22/86, OEA/Ser.L/V/II.68, doc. 8 rev. 1 ¶ 172 (1998).

154. See, e.g., *Osman v. United Kingdom*, 29 Eur. Ct. H.R. 245 (1998) (“It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”).

prevent, investigate, prosecute, punish, and provide remedies for violent acts done by private actors.<sup>155</sup>

In the realm of violence against women, the due diligence standard is no different. For example, in Article 4 of the 1993 Declaration on the Elimination of Violence against Women, the UN General Assembly stated that states should “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”<sup>156</sup> The 2006 report of the Special Rapporteur on Violence against Women labeled the due diligence standard as a “yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women.”<sup>157</sup>

State compliance with obligations of due diligence is measured by the following considerations: ratification of international human rights instruments; constitutional guarantees of equality; national legislation and/or administrative sanctions providing adequate redress for female victims of violence; policies addressing the issue of violence against women; the gender sensitivity of the criminal justice system and police; accessibility and availability of support services; measures aimed at raising awareness and modifying discriminatory policies in the field of education and the media; and the collection of data and statistics concerning violence against women.<sup>158</sup> The Special Rapporteur on Violence Against Women also concluded that, based on practice and *opinio juris*, the obligation to prevent and respond to acts of violence against women with due diligence rises to the level of a rule of customary international law.<sup>159</sup> Increasingly, the CEDAW Committee or monitoring body has focused on the state’s affirmative duty to prevent violence against individuals or certain groups at risk. For example, in the *A.T. v. Hungary* case, the woman claimant alleged the state failed to provide her with “effective protection from

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155. See, e.g., Human Rights Comm., General Comment No. 31 on the nature of the General Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (Mar. 29, 2004) (“There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”).

156. G.A. Res. 48/104, art. 4, Declaration on the Elimination of Violence against Women (Dec. 20, 1993), <http://www.un.org/documents/ga/res/48/a48r104.htm> [<https://perma.cc/8R8Q-WWSZ>] (archived Aug. 31, 2018).

157. Yakin Ertürk (Special Rapporteur on Violence Against Women, its Causes and Consequences), *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, ¶ 14, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

158. *Id.* ¶ 32 (citing an earlier report on domestic violence for the list of considerations).

159. *Id.* ¶ 29.

the serious risk to her physical integrity, physical and mental health and her life” from her former husband.<sup>160</sup>

Regarding the narrower issue of conflict-related sexual violence, one of the state’s key obligations under CEDAW is the duty to respond to acts of violence against women, including duties to investigate, punish, and provide redress, articulated in the due diligence standard.<sup>161</sup> In its recent literature on conflict-related sexual violence, the CEDAW Committee has cited its previous explanations of the due diligence obligations regarding violence against women, particularly the principle that “States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women.”<sup>162</sup> Under the duty to protect, the CEDAW Committee recommends implementing measures to help female complainants of gender-based violence through legal processes, including access to legal aid, various health and counseling services, and training and employment opportunities for women survivors and their families.<sup>163</sup> As for prosecution and punishment, CEDAW builds on its previous work to call on states to ensure victims of sexual violence have “effective access” to courts; this means the formal application of criminal law to bring perpetrators to trial, and not just diverting victims to alternatives like mediation.<sup>164</sup> Beyond criminal liability, the CEDAW Committee also recognizes the duty to provide effective reparations, both monetary and in the form of various social services, especially within transitional justice mechanisms or post-conflict situations.<sup>165</sup>

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160. *A.T. v. Hungary*, Communication No. 2/2003, Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 9.2 (Jan. 26, 2005), <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf> [<https://perma.cc/ET44-2CYV>] (archived Aug. 31, 2018).

161. Ertürk, *supra* note 157, ¶¶ 32, 29.

162. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, ¶ 24, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017) [hereinafter General Recommendation 35]; *see also* General Recommendation 30, *supra* note 135, ¶ 15 (“In its general recommendations Nos. 19 and 28, the Committee has outlined due diligence obligations in protecting women from violence and discrimination, emphasizing that, alongside constitutional and legislative measures, States parties must also provide adequate administrative and financial support for the implementation of the Convention.”).

163. General Recommendation 35, *supra* note 162, ¶ 40.

164. *Id.* ¶¶ 44–45.

165. *Id.* ¶¶ 46–47.

#### IV. APPLYING DUE DILIGENCE: PROBLEMS AND SOLUTIONS FOR CONFLICT-RELATED SEXUAL VIOLENCE IN IRAQ

Sexual violence within the ISIL conflict has received a lot of attention, especially due to the well-documented plight of the Yazidi women. The government of Iraq has responded by expressing its commitment to combating conflict-related sexual violence, in line with its due diligence obligations.<sup>166</sup> In 2016, the UN and Iraq signed a cooperation agreement, the Joint Communiqué, to ensure structured collaboration between the UN and Iraq regarding a comprehensive response to conflict-related sexual violence, highlighting six priority areas: legislative and policy reform, accountability, services and reparations, engagement of religious and tribal leaders as well as community groups, integration of gender considerations into counterterrorism measures, and awareness raising.<sup>167</sup> The proposed response and support include the documentation and collection of evidence of such crimes; strengthening the Iraqi legal framework to be able to better deal with sexual violence; and providing mechanisms for victim compensation.<sup>168</sup> While Iraq has expressed continued commitment in these areas,<sup>169</sup> the actual implementation of these due diligence obligations has had mixed results.

##### A. Accountability: Due Diligence in the Criminal Sphere

CEDAW and international human rights bodies have clearly delineated the duties of investigation, punishment, and redress for crimes of sexual violence in conflict. However, while there has been significant evidence of ISIL's organized program of sexual violence and enslavement, criminal prosecutions of ISIL members for these gender-specific crimes remains unlikely.

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166. Press Release, United Nations Iraq, The United Nations and the Government of Iraq Sign Landmark Agreement on the Prevention and Response to Conflict-Related Sexual Violence (Sept. 23, 2016), [http://www.uniraq.com/index.php?option=com\\_k2&view=item&id=5552:the-united-nations-and-the-government-of-iraq-sign-landmark-agreement-on-the-prevention-and-response-to-conflict-related-sexual-violence&Itemid=605&lang=en](http://www.uniraq.com/index.php?option=com_k2&view=item&id=5552:the-united-nations-and-the-government-of-iraq-sign-landmark-agreement-on-the-prevention-and-response-to-conflict-related-sexual-violence&Itemid=605&lang=en) [https://perma.cc/3EYJ-V475] (archived Aug. 31, 2018) [hereinafter United Nations Iraq].

167. U.N. Secretary-General, *Report on Conflict-Related Sexual Violence*, ¶ 41, U.N. Doc. S/2017/249 (Apr. 15, 2017), <http://www.un.org/en/events/elimination-of-sexual-violence-in-conflict/pdf/1494280398.pdf> [https://perma.cc/9LDC-NHD7] (archived Aug. 31, 2018).

168. United Nations Iraq, *supra* note 166.

169. *Iraq Confirms Commitment to Prevention of Sexual Violence*, THE BAGHDAD POST (June 19, 2017, 11:36 AM), <http://www.thebaghdadpost.com/en/story/12260/Iraq-confirms-commitment-to-prevention-of-sexual-violence> [https://perma.cc/Z8CF-VFRV] (archived Aug. 31, 2018) [hereinafter *Iraq Confirms Commitment*].



There are several different options to prosecute ISIL for its crimes, including the ICC, an *ad hoc* international criminal tribunal, national or local courts, or foreign national courts. While CEDAW's due diligence standard only relates to domestic prosecutions, this Note will quickly address the option of an international criminal trial.

### 1. International Criminal Options

Many activists and journalists have focused on prosecuting ISIL in an international criminal setting, particularly for their kidnapping and enslaving of Yazidi women.<sup>170</sup> As early as March 2015, the UN acknowledged in a report by the UN Assistant Mission in Iraq and the UN High Commissioner for Human Rights that ISIL's actions may amount to war crimes, crimes against humanity, and possibly genocide.<sup>171</sup> Significant UN actors, including High Commissioner Zeid bin Ra'ad and France, a permanent member of the Security Council, have also have expressed support for prosecution by the ICC.<sup>172</sup>

While accountability at the ICC has been proposed and discussed by many scholars, there remain obstacles to actual progress. Activists and advocates have already expressed frustration at the inaction of the ICC regarding ISIL's crimes. One such activist is Nadia Murad, who was only twenty-one when she and other Yazidi women were abducted and sold into sexual slavery by ISIL in 2014.<sup>173</sup> Murad has admitted she is worn out from telling her harrowing story over and over to diplomats, though still determined to find accountability for ISIL's crimes.<sup>174</sup> At one Security Council briefing in 2017, she asked diplomats bluntly what more they needed to act.<sup>175</sup> As Murad's frustration reflects, even when there is international commitment to

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170. Alexandra King, *Former ISIS Sex Slave Demands Justice for Yazidis*, CNN (Mar. 22, 2017), <https://www.cnn.com/2017/03/19/middleeast/nadia-murad-amal-clooney-cnntv/index.html> [perma.cc/N5RV-JFN7] (archived Aug. 25, 2018).

171. Human Rights Council, *On the Human Rights Situation in Iraq in Light of Abuses Committed by the so-called Islamic State in Iraq and the Levant and Associated Groups*, Rep. on the Work of Its Twenty-Eighth Session, ¶ 16, U.N. Doc. A/HRC/28/18, (Mar. 27, 2015).

172. Joshua Keating, *Why It's So Hard to Prosecute ISIS for War Crimes*, SLATE (Apr. 8, 2015), [http://www.slate.com/blogs/the\\_slatest/2015/04/08/isis\\_and\\_the\\_ice\\_why\\_it\\_s\\_will\\_be\\_tough\\_to\\_prosecute\\_the\\_islamic\\_state\\_for.html](http://www.slate.com/blogs/the_slatest/2015/04/08/isis_and_the_ice_why_it_s_will_be_tough_to_prosecute_the_islamic_state_for.html) [perma.cc/8YTT-Y8HU] (archived Aug. 25, 2018).

173. Somini Sengupta, *For a Yazidi Woman, Justice for ISIS Crimes is Still Elusive*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/world/middle-east/for-a-yazidi-woman-justice-for-isis-crimes-is-still-elusive.html> [perma.cc/3JL2-G952] (archived Aug. 25, 2018).

174. *Id.*

175. *See id.* (“[S]he looked up from her notes at one point and snapped, in halting English at a room full of hushed diplomats from the world's most powerful countries. ‘What more do you need before you will act?’ she asked bluntly.”).

accountability, there is often a gap between the priorities of international actors and local communities. International actors may be “more concerned about sending a general deterrent message regarding atrocities than about the specific, long-term needs of the particular post-conflict society directly involved.”<sup>176</sup>

At present, it is unlikely ISIL members will be prosecuted at the ICC. First, under the Rome Statute the ICC does not have jurisdiction over situations of conflict that occur in states that have not signed the Rome Statute, which neither Iraq nor Syria have.<sup>177</sup> The only way the ICC can exercise jurisdiction in such countries is through a referral by the Security Council; such a referral is unlikely, given that in May 2014 Russia and China, two permanent members of the UN Security Council, vetoed a Security Council resolution that would have referred the situation in Syria to the ICC.<sup>178</sup> Furthermore, a referral or acceptance of jurisdiction by either country opens the door to the entire conflict being examined for war crimes and human rights violations, not just crimes committed by ISIL.<sup>179</sup> Both Russia and the United States may be hesitant to grant such jurisdiction, since Russia has allied itself with the Assad regime, which has been accused of gross human rights violations, and the United States has backed rebels in the area who have also been accused of abuses and retaliatory violence.<sup>180</sup> Without either Iraq or Syria becoming a party to the Rome Statute or accepting the ICC’s jurisdiction, this avenue for recourse seems unlikely for either state, especially for Syria—as of February 2018, Syrian government forces and rebels remain engaged in a bloody conflict, including severe bombings creating a humanitarian crisis.<sup>181</sup>

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176. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 261 (2007).

177. Karadsheh & Jackson, *supra* note 34.

178. See Rep. of the S.C., U.N. Doc. S/2014/348 (May 22, 2014) (noting that China and Russia did not sign on to the Security Council document referring the situation in Syria to the ICC); Keating, *supra* note 172 (discussing the unlikelihood of Chinese and Russian willingness to intervene in Syria after previous involvement by the ICC in Libya and a general unwillingness for those two countries to violate national sovereignty in the name of human rights).

179. Keating, *supra* note 172; see also *Iraq: Yezidi Fighters Allegedly Execute Civilians*, HUMAN RIGHTS WATCH (Dec. 27, 2017), <https://www.hrw.org/news/2017/12/27/iraq-yezidi-fighters-allegedly-execute-civilians> [perma.cc/6LFE-JN9C] (archived Aug. 25, 2018) (discussing allegations of Yezidi fighters forcibly disappearing and killing 52 civilians in June 2017).

180. Keating, *supra* note 172.

181. See, e.g., F. Brinley Bruton, Ammar Cheikh Omar & Lawahez Jabari, *Bombing Intensifies in Eastern Ghouta, Syria: 190 Killed Since Sunday*, NBC (Feb. 20, 2018), <https://www.nbcnews.com/news/mideast/nearly-200-die-syrian-bombing-eastern-ghouta-intensifies-n849541> [perma.cc/P3DS-SU55] (archived Aug. 25, 2018) (labeling recent bombings as “the deadliest days” for the area since 2015).

The UN could create an international criminal tribunal similar to those created for the former Yugoslavia and Rwanda, to prosecute ISIL in an international forum.<sup>182</sup> In anticipation of such a tribunal, advocacy groups and investigators have been quietly collecting evidence of ISIL's crimes in northern Iraq for the last two years.<sup>183</sup> The Daesh Criminal Investigations Unit has been working with the Commission for International Justice and Accountability—which has pushed for the establishment of a specialized ISIL tribunal in Iraq—to collect thousands of documents, phone records, videos, and other pieces of evidence left by ISIL; they have at least two cases ready for prosecution and have identified two dozen ISIL leaders and members linked to crimes against the Yazidis.<sup>184</sup> The UN has also authorized an investigation team to help Iraq hold ISIL accountable through the collection of evidence in a unanimous Security Council resolution in September 2017.<sup>185</sup> While this was a promising development, a separate international tribunal remains an improbable option for prosecution, given the Security Council must vote to establish such a tribunal.<sup>186</sup>

## 2. National & Local Prosecutions—Due Diligence to Investigate and Punish

Accountability via prosecution of wartime crimes, then, often falls onto national governments and local communities; UN bodies have stated that national prosecutions remain the only viable path for culpability in Syria and Iraq.<sup>187</sup> Some domestic prosecutions have already begun, though they are generally not for crimes of sexual violence and fall short of satisfying the due diligence standards regarding investigation and punishment of acts of violence against women.<sup>188</sup> While there are practical reasons for the current failure to

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182. See Karadsheh & Jackson, *supra* note 34 (discussing location options for a criminal tribunal to pursue ISIS crimes).

183. *Id.*

184. *Id.*

185. *Id.*

186. Mark Kersten, *Calls for prosecuting war crimes in Syria are growing. Is international justice possible?*, WASH. POST, (Oct. 14, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/?noredirect=on&utm\\_term=.869dc2864701](https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/14/calls-for-prosecuting-war-crimes-in-syria-are-growing-is-international-justice-possible/?noredirect=on&utm_term=.869dc2864701) (discussing the so-far unsuccessful efforts to refer crimes to the ICC or an ad hoc tribunal due to Security Council vetoes).

187. HRC Report, *supra* note 15, ¶ 200.

188. See Tamer El-Gobashy & Mustafa Salim, *Iraq's Rapid-Fire Trials Send ISIS Members—including Foreigners—to the Gallows*, WASH. POST (Dec. 28, 2017), <https://www.stripes.com/news/middle-east/iraq-s-rapid-fire-trials-send-alleged-isis-members-to-the-gallows-1.504465> [<https://perma.cc/JY5G-R9F5>] (archived Aug. 31, 2018) (explaining Iraq's controversial accelerated trial process for crimes committed by those linked to ISIS).

prosecute ISIL for gender-based violent crimes,<sup>189</sup> the non-prosecution of these crimes reflects the broader neglect of gender-based violence by international and domestic actors.

As ISIL's territorial control has waned, Iraq has begun accelerated trials for accused ISIL fighters.<sup>190</sup> As of December 2017, the Justice Ministry had disclosed 194 terrorism-related executions—by hanging—including some twenty-seven foreigners from other Arab nations.<sup>191</sup> Up to six thousand more are awaiting execution.<sup>192</sup> Courts have followed Prime Minister Haider al-Abadi's orders to quickly move through these trials in order to “give comfort” to the families of Islamic State victims.<sup>193</sup>

These trials have revealed serious tensions between Iraq and the international community, as advocacy groups have expressed concern over unfair trials and exacerbation of sectarian tensions.<sup>194</sup> These accelerated trials are occurring despite the fact that the UN has said Iraq does not have jurisdiction over ISIL's crimes and that Iraq's justice system is insufficiently equipped to guarantee due process rights will be respected in the trials.<sup>195</sup> In December of 2017, Human Rights Watch (HRW) released a report detailing potential problems with these rapid-fire trials, including both legal credibility concerns and the potential for impeding proper reconciliation.<sup>196</sup> HRW reports that prior to the trials, individuals are detained in unsafe, overcrowded conditions with little credible evidence of their involvement with ISIL.<sup>197</sup> Furthermore, charges are often based on “confessions” obtained under duress or under broad counterterrorism statutes, leading to a judicial record severely lacking details of the alleged abuses and crimes.<sup>198</sup> These counterterrorism statutes sweep so broadly that life in prison or the death penalty are viable sentences for more tangential ISIL actors, such as doctors who worked in ISIL hospitals, local shop individuals who sold or cooked food for ISIL

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189. HRC Report, *supra* note 15, ¶ 187.

190. El-Gobashy & Salim, *supra* note 188.

191. *Id.*

192. *Id.*

193. *Id.*

194. Karadsheh & Jackson, *supra* note 34.

195. El-Gobashy & Salim, *supra* note 188.

196. HUMAN RIGHTS WATCH, FLAWED JUSTICE: ACCOUNTABILITY FOR ISIS CRIMES IN IRAQ 3–4 (2017), [https://www.hrw.org/sites/default/files/report\\_pdf/iraq1217web.pdf](https://www.hrw.org/sites/default/files/report_pdf/iraq1217web.pdf) [<https://perma.cc/3HMH-2V8E>] (archived Aug. 31, 2018) [hereinafter HRW Flawed Justice].

197. *See id.* at 47–49 (“Human Rights Watch visited one cell of roughly 4x6 meters that had been housing 114 detainees for four months. The detainees were not given regular access to the outdoors or to showers. They ate and used a single toilet inside the room. The windows were bricked up, and the temperature and stench in the room were overpowering.”).

198. *Id.* at 4, 21.

fighters, and lawyers who practiced in ISIL courts.<sup>199</sup> To add a gender-based twist to the due process issue, affiliation with ISIL has resulted in life in prison or death sentences for ISIL widows and women.<sup>200</sup> This is happening in spite of an August 2016 law that offers amnesty to anyone who joined ISIL against their will.<sup>201</sup>

These shortcomings are also amplified in the judicial system in the Kurdish Regional Government of Iraq, which displays little coordination and hardly any cohesive approach to the prosecution of ISIL suspects.<sup>202</sup> These regional prosecutions also must work to overcome the ongoing tensions between the regional Kurdish government and the central government of Iraq.<sup>203</sup> In October 2017, for instance, tensions rose after the Kurdish Regional Government held an independence referendum; shortly after, Iraq retook the oil-rich province of Kirkuk by force.<sup>204</sup>

Besides violating defendants' due process rights, and more importantly for CEDAW obligations of due diligence, these prosecutions have also been criticized for their lack of victim involvement, including those who suffered sexual violence, and for exacerbating harm to victims.<sup>205</sup> Most of the above-discussed trials have consisted of terrorism charges, and even those cases involving sexual crimes have been rushed through without victim involvement.<sup>206</sup> For example, one ISIL militant in court admitted, in addition to other crimes like mass murder, to kidnapping and raping four Yazidi women, who were part of his "salary."<sup>207</sup> While it is

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199. Nadim Houry, *The Justice Question After ISIS*, HUMAN RIGHTS WATCH (Aug. 25, 2017), <https://www.hrw.org/news/2017/08/25/justice-question-after-isis> [https://perma.cc/3FZ8-PBUM] (archived Aug. 31, 2018).

200. Martin Chulov, *'They deserve no mercy': Iraq deals briskly with accused 'women of Isis*, THE GUARDIAN (May 22, 2018), <https://www.theguardian.com/world/2018/may/22/they-deserve-no-mercy-iraq-deals-briskly-with-accused-women-of-isis> [https://perma.cc/9C77-R22G] (archived Aug. 31, 2018).

201. Houry, *supra* note 199.

202. HRW *Flawed Justice*, *supra* note 196, at 22.

203. Maher Chmaytelli & Raya Jalabi, *Iraqi forces complete Kirkuk takeover after clashes with Kurds*, REUTERS (Oct. 20, 2017), <https://www.reuters.com/article/us-mideast-crisis-iraq-kurds-clash/iraqi-forces-complete-kirkuk-province-takeover-after-clashes-with-kurds-idUSKBN1CP0PT> [https://perma.cc/MEC3-A9V3] (archived Aug. 31, 2018).

204. *Id.*

205. Belkis Wille, *ISIS is on the Ropes Iraq. Now the UK Needs to Push for Justice*, HUMAN RIGHTS WATCH (Dec. 4, 2017, 12:00 AM), <https://www.hrw.org/news/2017/12/04/isis-ropes-iraq-now-uk-needs-push-justice> [https://perma.cc/7ASJ-NTRJ] (archived Aug. 31, 2018).

206. *Id.*

207. Josie Ensor, *'I got four Yazidi virgins as part of my Isil salary and has sex with a different one every night'*, THE TELEGRAPH (July 31, 2017), <https://www.telegraph.co.uk/news/2017/07/31/quivering-isis-suspects-face-investigations-court-mosul-atrocities/> [https://perma.cc/L9X3-WFGQ] (archived August 28, 2018).

unclear if he was convicted for these sexual crimes or general ISIL membership, or both,<sup>208</sup> either way the court declined to involve any of the four sexual violence victims in the court proceedings.<sup>209</sup> So even in the rare cases where sexual crimes are specifically charged or discussed, little attention is given to the victim's perspective, personal needs, or need for accountability.<sup>210</sup>

Even when there is a suitable legal structure in place, there are still obstacles to creating an environment where it is acceptable to speak about sexual violence and that is not detrimental to the victim. Some of the rhetoric and legal approaches used to describe horrific crimes like conflict-related sexual violence end up impeding investigations and testimony regarding these crimes. The importance of giving victims of sexual violence a voice, particularly in an investigative or judicial setting, cannot be overstated. Yet, socially labelling the victims' experiences as "unspeakable or unbearable" silences victims, informing them the general public does not want to hear their graphic, detailed accounts.<sup>211</sup> Such reluctance extends to those tasked with seeking justice. Even in the international arena, rhetoric of rape being the "worst" harm and calling for punishment can have the unintended consequence of reinforcing harmful, gendered notions of purity and resulting stigma.<sup>212</sup> Empirical studies interviewing judges, prosecutors, investigators, victims, and witnesses within tribunals like the ICTY report sexist attitudes and reluctance to deal with these sensitive issues.<sup>213</sup> Prosecutors state they are reluctant to ask detailed questions out of embarrassment and reveal their preference for murder or other cases, a sentiment prevalent in much of the history of international criminal

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208. Compare Wille, *supra* note 205 ("In one particularly galling example, a defendant admitted during his trial that he had held four women as sex slaves, raping a different one each night. But the court only convicted him for ISIS membership.") with Ensor, *supra* note 207 ("[The suspect] seemed unrepentant as he confessed to his crimes; four counts of kidnap and rape of women belonging to the minority Yazidi sect and 10 counts of the murder of its men.").

209. See Ensor, *supra* note 207.

210. *Id.*

211. See Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT'L L.J. 639, 660 (2015) ("[T]he greatest challenge for justice...is that detailed accounts are required of issues that we are neither prepared to speak about or hear.").

212. Aolain, O'Rourke & Swaine, *supra* note 129, at 111–12.

213. See de Brouwer, *supra* note 211, at 657 ("Several prosecutors and judges alike made statements like: 'It is so hard to look into [survivors' or witness] eyes,' 'it is too close' (a male prosecutor referencing men being the perpetrators in many of the sexual violence cases), 'I get embarrassed asking questions to rape victims,' 'they hardly talk about sex in front of strangers, even when as prosecutors they have to talk to victims,' and 'I would prefer only murder cases. I am more sensitive with women who have been raped.'").

tribunals.<sup>214</sup> This chilling effect may exist despite situations where survivors are willing to speak and insist that doing so is empowering, showing they have nothing to hide.<sup>215</sup> Others may be silenced by unwanted exposure and scrutiny: by one recent account, Iraqi intelligence officers interrogated a fifteen-year old Yazidi girl freed from her ISIL captor about why she did not escape or notify authorities, then published the video interview on Facebook without concern for exposing her identity or for domestic human trafficking laws protecting victims' privacy.<sup>216</sup>

As gender-based violence and wartime sexual violence have gained more attention in the international community, prosecution of such crimes has been scrutinized. On a field visit, the first Special Rapporteur on violence against women asked the following questions to provide guidance specifically on the CEDAW due diligence standard and responding to violence committed by private actors:

Is the criminal justice system sensitive to the issues of violence against women? . . . How many cases are investigated by the police? How are the victims dealt with by the police? How many cases are prosecuted? What type of judgments are given in such cases? Are the health professionals who assist the prosecution sensitive to issues of violence against women? Do women who are victims of violence have support services such as shelters, legal and psychological counselling, specialized assistance and rehabilitation provided either by the Government or by non-governmental organizations?<sup>217</sup>

Using this guidance, there are clear areas for improvement to bring Iraq closer in line with its due diligence obligations under CEDAW regarding criminal prosecution. First, Iraq should implement better coordination procedures so trials across regions reflect a national strategy and target the worst perpetrators.<sup>218</sup> While this Note will not discuss at length the due process issues with the trials in Iraq, it still acknowledges that ensuring fair trials for defendants is important and required under international law. For the purposes of this Note, Iraq's lack of victim participation is the

214. *See id.* (describing the “discomfort” of prosecutors in the Nuremberg trials regarding sexual violence crimes, which were labeled “too distasteful” to prosecute).

215. *See id.* (citing several survivors who chose to testify and/or share their stories publicly).

216. *Yezidi Girl's Freedom Opens Door to Justice in Iraq*, HUMAN RIGHTS WATCH (Apr. 2, 2018), <https://www.hrw.org/news/2018/04/02/yezidi-girls-freedom-opens-door-justice-iraq> [<https://perma.cc/XC4W-8CSC>] (archived Aug. 29, 2018).

217. Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, its Causes and Consequences), *Violence Against Women in the Family*, ¶ 25, U.N. Doc. E.CN. 4/1999/68 (Mar. 10, 1999).

218. HRW Flawed Justice, *supra* note 196, at 5–6; *see also* Karadsheh & Jackson, *supra* note 34 (“[E]xactly where and how these cases will be heard is tangled up in the complexities of politics and differences between the central government in Baghdad and the Kurdistan Regional Government (KRG) in Erbil.”).

crucial problem. By prosecuting under the counterterrorism statutes, which only require a showing of ISIL membership, the courts have been focused on efficiency rather than the vital task of creating a judicial record of the wide variety of crimes ISIL has committed against Iraqis, especially those involving sexual violence.<sup>219</sup> Ideally, the victims of those crimes should be invited to participate in these trials, to provide testimony and confront suspected ISIL members. There are reports that ISIL victims are interested in this kind of participation but are not being granted this opportunity.<sup>220</sup>

Iraq's precarious security and financial situation is an understandable area of concern for those authorities involved in these prosecutions—last year one judge revealed he had bought everything in the courtroom, from his desk to air conditioning, with his own money because “nothing comes from Baghdad” and “[i]f we don't pay for it, no one else will.”<sup>221</sup> Given these circumstances, Iraq should take advantage of all the international help and resources it has asked for and that are being offered to aid the investigation and punishment of ISIL perpetrators of sexual or gender-based violence.<sup>222</sup> This includes coordinating with the investigative efforts of actors like the Commission for International Justice and Accountability—a criminal-investigative group—and the UN Security Council investigative team, both of which have prioritized the thorough collection and documentation of evidence of ISIL's crimes.<sup>223</sup> The latter, created by UN Security Council Resolution 2379, at Iraq's request, envisions coordination with Iraqi authorities.<sup>224</sup> However, the resolution also provides that “the evidence collected and stored by the Team in Iraq should be for eventual use in fair and independent criminal proceedings, consistent with applicable international law, conducted by competent national-level courts.”<sup>225</sup> The Iraqi

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219. HRW Flawed Justice, *supra* note 196, at 4.

220. *See id.* at 21–22 (“While victims' communities in Iraq have been calling for justice, the ongoing trials grant victims no meaningful opportunities to participate, including to attend, testify, or submit questions to suspects.”).

221. Ensor, *supra* note 207.

222. *See* Riham Alkousaa, *Iraq seeks international help to investigate Islamic State crimes*, REUTERS (Aug. 16, 2017), <https://www.reuters.com/article/us-mideast-crisis-iraq-un/iraq-seeks-international-help-to-investigate-islamic-state-crimes-idUSKCN1AW2E7> [<https://perma.cc/8TDQ-YZDJ>] (archived Aug. 29, 2018) (describing Iraq's formal written request “to get benefited from international expertise to criminalize Daesh terrorist entity” so it can bring ISIS members to justice in Iraqi courts).

223. *See* HRW Flawed Justice, *supra* note 196, at 62 (“[O]nce the team becomes operational, it should play a positive role in advocating that federal Iraqi and KRG authorities bring charges against ISIS suspects for the full range of crimes they have committed...[and] take a more victim-centered approach to national accountability efforts.”).

224. S.C. Res. 2379, ¶ 5 (Sept. 21, 2017).

225. *Id.*



government could facilitate a better relationship with the UN team, therefore increasing evidence sharing, by reducing the use of the death penalty.<sup>226</sup> And, since the investigative team is mandated to investigate ISIL crimes exclusively, the Iraqi government should not be concerned with investigations into its own possibly criminal actions during the conflict.<sup>227</sup> The Iraqi government can also enhance coordination with other investigator-actors by criminalizing genocide, war crimes, and crimes against humanity in its domestic law.<sup>228</sup>

In addition to providing legal processes, Iraq should also ensure those legal options are actually available to victims—as will be discussed, some communities have taken steps to combat the social and cultural obstacles to legal redress.

### B. Due Diligence and Reparations

The UN has issued documents highlighting the right to an effective remedy within the due diligence framework. For instance, the Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence provides policy and operational guidance for the United Nations when dealing with reparations in this area, with particular emphasis on victim participation, the transformative goal of reparations, and the gendered nature and consequences of the harms at issue.<sup>229</sup> Out of a number of post-conflict mechanisms, the UN Secretary-General has highlighted reparations as the “most victim-centered justice mechanism available and the most significant means of making a difference in the lives of victims.”<sup>230</sup> The CEDAW Committee has also highlighted the importance of reparations having transformative effects for women, covering more than just civil and political rights violations.<sup>231</sup> This

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226. See Yola Verbruggen, *Bringing ISIS to justice*, INT’L BAR ASS’N (Feb. 16, 2018), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4C5A020B-0A96-4421-9572-71825D087D82> [<https://perma.cc/8P7K-BMVA>] (archived Aug. 30, 2018) (citing Iraq’s use of the death penalty as the main obstacle to settling on the terms of reference for the investigation team).

227. See S.C. Res. 2379, *supra* note 224, ¶ 2 (authorizing the establishment of an investigative team “to support domestic efforts to hold ISIL (Da’esh) accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by the terrorist group ISIL (Da’esh) in Iraq”).

228. See, e.g., HRW Flawed Justice, *supra* note 196, at 27 (“Iraqi judicial authorities are also unable to prosecute international crimes such as war crimes, crimes against humanity and genocide because they are not enshrined in national law.”).

229. Reparations Guidance Note, *supra* note 84, at 1–2.

230. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 26, U.N. Doc. S/2011/634, (Oct. 12, 2011).

231. See General Recommendation 30, *supra* note 135, ¶¶ 74, 79, 81 (“For most women, post-conflict justice priorities should not be limited to ending violations of civil

means one goal of transitional justice mechanisms like reparations is to encourage states to take advantage of opportunities to confront and remedy the entrenched sex and gender-based discrimination that has previously impeded the fulfillment of rights under the CEDAW Convention.<sup>232</sup>

Reparations exist in forms such as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>233</sup> Other goals for reparations include encouraging structural reforms and preventing a “domino effect,” where sexual violence results in additional losses.<sup>234</sup> Reparation programs thus are both backward looking, aiming to repair a past wrong, and forward looking, helping to rebuild and reconcile the community.<sup>235</sup> These broader goals, however, must be translated into rules and policies, which lead to a number of practical implementation questions, which will be discussed below.

### 1. Reparations—Compensation

Many reparations seek to compensate individual victims materially for the harm he or she has suffered. Compensation is a common form of reparation, but monetary support can be difficult to implement and is an insufficient remedy without other forms of reparations.

First, obstacles arise as lawmakers inevitably must draw lines categorizing and defining who is a “victim” or what crimes qualify for reparations.<sup>236</sup> For example, some reparations programs explicitly list the forms of sexual violence qualifying a victim for reparations, which may or may not be read expansively to include acts such as: sexual slavery, as in Guatemala; forced abortion, as in Peru; and genital mutilation, as in both countries.<sup>237</sup> Even programs that have broader conceptions of sexual violence may be inclined to prioritize and categorize certain forms of sexual violence over others. Other

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and political rights but should include violations of all rights including economic, social and cultural rights.”).

232. *See generally id.*

233. Reparations Guidance Note, *supra* note 84, at 1–2.

234. Colleen Duggan & Ruth Jacobson, *Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation*, in *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 121, 124 (Ruth Rubio-Marín ed., 2009).

235. Ruth Rubio-Marín, *Gender and Collective Reparations in the Aftermath of Conflict and Political Repression*, in *THE GENDER OF REPARATIONS*, *supra* note 234, at 382.

236. *See* Duggan & Jacobson, *supra* note 234, at 132–36 (discussing the “double-edged sword” of both categorizing qualifying sexual violence broadly and in more detail).

237. *See id.* at 132 (comparing the wording of various definitions and categories).

questions arise about who is included in reparation programs. Family members of victims may qualify as “beneficiaries” who experienced some damage, such as the loss of potential future children, and children themselves born of rape may be included in the “victim” status.<sup>238</sup> There is, however, a gender component to this approach. For instance, the program in Guatemala, citing resources and the disparate statistics, only permitted female sexual violence victims to receive reparations whereas other programs have chosen not to base qualification on gender.<sup>239</sup> Furthermore, monetary compensation may bring its own discriminatory issues: there is a danger in placing some “price” or monetary worth on a woman’s loss of virginity or reproductive injuries, particularly in contexts where providing compensation, especially to male beneficiaries, would reinforce patriarchal notions of a woman’s value stemming from her ability to have children.<sup>240</sup> Reparations recognizing the material hardships stemming from sexual violence may be beneficial, but only if administered in a gender-sensitive way—this sensitivity might entail distributing compensation while respecting those victims who wish to remain anonymous.<sup>241</sup>

A number of scholars and activists have expressed a preference for administrative monetary reparations programs over those obtained in a judicial setting. While acknowledging that victims should always have the option of judicial reparations awards, the UN Secretary-General observed that administrative reparations may be preferable for large scale violations.<sup>242</sup> The latter offer greater potential to help victims for a number of reasons: administrative reparations avoid some of the difficulties and higher costs of litigation, the need for evidence that may be difficult to find, pain and potential embarrassment when being cross-examined in court, and victims’ lack of confidence in the justice system.<sup>243</sup> This preference assumes that these programs are simplified procedurally, have lower evidence requirements, and spare victims some of the potential stigma through confidentiality.<sup>244</sup>

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238. *Id.* at 137.

239. *See id.* at 138 (“Scarcity of resources and the largely disparate numbers of male and female victims may justify the temptation to limit benefits for women, but doing so reinforces the notion that only women can be subject to such offences, underscoring notions of femininity and masculinity that would actually be worth subverting.”).

240. *Id.* at 137, 139 (suggesting a way to avoid the beneficiary problem would be to include family members of victims of sexual violence as potential candidates for medical and psychological support rather than compensation, as was recommended in Sierra Leone and Timor-Leste).

241. *Id.* at 139.

242. Reparations Guidance Note, *supra* note 84, at 6.

243. Duggan & Jacobson, *supra* note 234, at 132.

244. *Id.*

While UN efforts like the Guidance Note have amplified the rhetoric of protecting individuals from sexual violence in conflict, there is a stark difference between these statements and actual, direct support to survivors.<sup>245</sup> Even the binary distinction between “conflict” and “post-conflict” fails to appreciate the continuous experience and vulnerabilities of certain populations, including women, in conflict-related areas.<sup>246</sup> Normative language and frameworks for talking about gender-based violence easily translate to the more situation-specific category of conflict-related sexual violence, as this Note has illustrated, and in reality women’s experiences with violence may not reflect a clear distinction between violence occurring during conflict versus in peace. Moreover, restitution is often considered a process of restoring the victim to her original situation, before any violations occurred.<sup>247</sup> However, such restoration is increasingly difficult, if not impossible, when the harm is inflicted through sexual violence and involves serious health and psychological problems.<sup>248</sup>

On a practical, operational level, material reparations programs face the challenge of finding sufficient political will following violent conflicts.<sup>249</sup> Transitional processes or moments present opportunities, when the political will is present, to establish reparations in conjunction with negotiations and truth commissions. Furthermore, there must be a clear administrative framework; in particular, the weakness of a domestic judicial system may mean that even when reparations are awarded, they may not be enforced and received.<sup>250</sup>

The conflicts in the Balkans and former Yugoslavia and subsequent attempts at victim compensation illustrate some of the obstacles to proper redress. In 2015, for example, Croatia’s parliament voted to enact a compensation scheme for rape victims of the Yugoslavian conflict.<sup>251</sup> This scheme involves a one-off payment of 100,000 kuna, or approximately \$14,504, and a monthly allowance of

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245. See, e.g., Aolain, O’Rourke, & Swaine, *supra* note 129, at 101–02 (describing the particular gap between the rhetoric and reality of remedies for women).

246. See *id.* at 105 (“The terms ‘conflict’ and ‘post-conflict’ tend to obscure the continuum of violence from ordinary times, to time of conflict, and into post-conflict settings, thereby creating false fissures in the capture of violent experiences. For women, the experience is often continuous rather than disjunctive.”).

247. *Id.* at 119.

248. See *id.* (emphasizing the importance of land and property ownership in the restitution context rather than on social notions of purity or honor).

249. See *id.* at 127 (“Reparations in post- conflict contexts do not emerge in a political vacuum.”).

250. See *id.* at 132 (discussing how a weak justice system in the DRC prevented receipt of many judicial awards).

251. Zoran Radosavljevic, *Croatia passes law to compensate war rape victims*, REUTERS (May 29, 2015), <https://uk.reuters.com/article/uk-croatia-rape/croatia-passes-law-to-compensate-war-rape-victims-idUKKBN0OE1M820150529> [<https://perma.cc/3HPS-EL72>] (archived Aug. 30, 2018).

2,500 kuna, in addition to free counseling, medical aid, and legal help.<sup>252</sup> With compensation coming over two decades after the conflict, survivors have expressed gratitude for compensation but said billions “could not pay for what we went through.”<sup>253</sup> Victims have also expressed frustration with the fact that many of their perpetrators, who were low-level rebels or soldiers, still live in the area after blanket amnesty was granted, saying “the law and the compensation are worth nothing if the perpetrators continue to walk free.”<sup>254</sup> Twenty years of silence, many advocates say, means that few will actually come forward after accepting for so long that society neglected them.<sup>255</sup> Additionally, those that do come forward may not necessarily receive financial compensation. In 2017, a Serb woman went to court to challenge the Croatian War Veterans Ministry’s decision to deny her wartime victim status and therefore her compensation.<sup>256</sup> The plaintiff, M.K., applied in 2016 but was denied on the basis of unpersuasive allegations, and may find no further avenue for remedies since there is no appeal process for the ministry’s decisions.<sup>257</sup>

From the victims’ perspective, other nations involved in the Balkan conflict of the 1990s have failed to hold abusers and perpetrators of sexual crimes accountable. Bosnian women complain about seeing their perpetrators in their neighborhood and can keep track of them on Facebook.<sup>258</sup> Many—some reports say up to 95 percent—end up facing additional trauma in the form of domestic abuse.<sup>259</sup> Even the collective memory of the communities has ignored or slighted the suffering of women and sexual violence survivors during the conflicts. For example, one of the main commemorative sites, the Srebrenica visitor center, infrequently displays women and when there is graffiti or images of women, they often portray the women in an insulting or degrading manner.<sup>260</sup> Victims’ testimony reflects this gendered perspective: they discuss the number of men

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252. *Id.*

253. *Id.*

254. *Id.*

255. Arijeta Lajka, *Balkan Wartime Rape Victims Continue to Face Hardships Decades after Conflict*, VICE NEWS (Apr. 13, 2015), <https://news.vice.com/article/balkan-wartime-rape-victims-continue-to-face-hardships-decades-after-conflict> [<https://perma.cc/QBP3-S9Z6>] (archived Aug. 30, 2018).

256. Sven Milekic, *War Rape Victim Sues Croatian Ministry*, BALKAN INSIGHT (Nov. 20, 2017), <http://www.balkaninsight.com/en/article/croatia-denies-sexual-war-victim-her-status-11-20-2017> [<https://perma.cc/9VAX-SUB4>] (archived Aug. 30, 2018).

257. *Id.*

258. Sue Turton, *Bosnian war rape survivors speak of their suffering 25 years on*, INDEPENDENT (July 21, 2017), [http://www.independent.co.uk/news/long\\_reads/bosnia-war-rape-survivors-speak-serbian-soldiers-balkans-women-justice-suffering-a7846546.html](http://www.independent.co.uk/news/long_reads/bosnia-war-rape-survivors-speak-serbian-soldiers-balkans-women-justice-suffering-a7846546.html) [<https://perma.cc/W3HW-HM3Y>] (archived Sept. 1, 2018).

259. *Id.*

260. *Id.*

and children who died, but will classify their own trauma by saying, “well, I lived.”<sup>261</sup> Financial compensation was available to victims under Bosnian law, but only through criminal proceedings, during which victims had to reveal their identities and proceed without any financial support.<sup>262</sup> No victim actually received a ruling granting compensation until 2015.<sup>263</sup>

These financial compensation programs and others provide valuable lessons for implementing any kind of program for victims of ISIL sexual violence.<sup>264</sup> The government in Iraq publicly expressed a commitment to the issue of conflict-related sexual violence.<sup>265</sup> As recently as March 2018, the Iraqi government ordered IQD\$2 million, or approximately USD\$1,700, to be paid to every Yazidi released from ISIL captivity.<sup>266</sup> These statements of support and actions are encouraging, and activists and victims should use these statements to hold the government accountable for programs aimed at aiding the Yazidis and other victims of ISIL’s acts of sexual violence. In particular, activists should push for an administrative reparations program; given the limited procedural and financial capacities of the Iraqi courts at the moment,<sup>267</sup> such a program may be more feasible and effective in actually delivering meaningful reparations to victims.<sup>268</sup> Furthermore, even for reparations programs with lower evidentiary standards, it is essential for the government, international actors, and individuals to continue investigating and documenting the crimes of ISIL.<sup>269</sup>

Besides some encouraging rhetoric from the government, there is also reason to be optimistic about a reparations scheme, since Iraq is not a stranger to legal compensation schemes for victims. In 2009, the

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261. *Id.*

262. *Bosnian courts grants wartime rape compensation in landmark ruling*, THE GUARDIAN (June 24, 2015), <https://www.theguardian.com/world/2015/jun/24/bosnian-court-grants-wartime-victim-compensation-landmark-ruling> [<https://perma.cc/X2GN-F968>] (archived Sept. 1, 2018).

263. *Id.*

264. *See* Igor Spaic, *Yazidi Massacre Survivors Learn Lessons from Srebrenica*, BALKAN INSIGHT (Aug. 3, 2017), <http://www.balkaninsight.com/en/article/yazidi-massacre-survivors-learn-lessons-from-srebrenica-08-03-2017> [<https://perma.cc/NAD2-RLA9>] (archived Sept. 1, 2018) (describing Yazidis’ commemoration of three years since ISIL attacked and their determination to have ISIL crimes recognized as genocide like the former Yugoslavia conflict).

265. *See, e.g., Iraq Confirms Commitment*, *supra* note 169.

266. *Money Welcome but No Panacea for Iraq’s Yazidi Victims*, HUMAN RIGHTS WATCH (Mar. 8, 2018), <https://www.hrw.org/news/2018/03/08/money-welcome-no-panacea-iraqs-yezidi-victims> [<https://perma.cc/J82E-55U4>] (archived Sept. 1, 2018).

267. *See, e.g., Ensor*, *supra* note 207 (quoting Iraqi judges who attribute Iraq’s imperfect legal processes to lack of funding).

268. Duggan & Jacobson, *supra* note 234, at 132.

269. *See, e.g., Spaic*, *supra* note 264 (“It is imperative that this forensic evidence needs to be collected as soon as possible...and that the survivors and the victims have their day in court.”).

Iraqi parliament passed Law No. 20 on Compensation for Victims of Military Operations, Military Mistakes, and Terrorist Actions, which was amended in 2015.<sup>270</sup> The specific types of damage covered included martyrdom or loss, full or partial disability, injuries and conditions requiring short-term treatment, damage to property, and damage affecting employment and study.<sup>271</sup> This law is unlikely to cover any of the sexual violence crimes this Note has discussed, despite all the direct and indirect effects of sexual violence on a person's physical state, ability to work, and mental health, among others.<sup>272</sup> The law has also faced some implementation issues, including bureaucratic delays due to a decentralized structure and a stringent evidentiary standard that has only become more onerous as the security situation has worsened.<sup>273</sup>

Still, even with its challenges, the compensation law may be useful either as a means or model for compensating victims of sexual violence: there are some structures in place already to provide victims with monetary aid, which may be assessed for their successes and flaws as officials think about how to deal with ISIL victims.<sup>274</sup> Furthermore, the government has shown in certain cases it can adapt to crises by lowering evidentiary requirements and drastically reducing delays for compensating victims.<sup>275</sup> While not every situation involves state actors as the perpetrators, state responsibility is still key to meaningful compensation: without states like Iraq acknowledging their responsibility to redress the harms of sexual violence, stigma will persist and recurrence may be more likely.<sup>276</sup> However, even as the KRG and Iraqi governments are coordinating to provide compensation to victims, one Yazidi representative noted how much was left to do: as of March 2018, “[a]t least 3260 Yazidis have so far been rescued from the IS captivity, but another three thousand of them are estimated to still be at the hands of the extremist group.”<sup>277</sup>

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270. CLARA SANDOVAL & MIRIAM PUTTICK, MINORITY RIGHTS GROUP, REPARATIONS FOR THE VICTIMS OF CONFLICT IN IRAQ: LESSONS LEARNED FROM COMPARATIVE PRACTICE 17 (2017), <https://reliefweb.int/sites/reliefweb.int/files/resources/Reparations-in-Iraq-Ceasefire-November-2017.pdf> [<https://perma.cc/4NQB-3XVN>] (archived Sept. 1, 2018).

271. *Id.* at 17–18.

272. *Id.* at 22.

273. *Id.* at 19–20.

274. *Id.* at 25–26.

275. *See id.* at 25 (describing how the government established an ad hoc committee to deal with claims from the 2016 Karrada bombing and how loosened document requirements enabled the committee to finish its work within about forty days).

276. Aolain, O'Rourke, & Swaine, *supra* note 129, at 132.

277. *Every Yazidi Survivor to Receive Two Million IQD: Official*, BASNEWS (Mar. 6, 2018), <http://www.basnews.com/index.php/en/news/kurdistan/420348> [<https://perma>

## 2. Collective or Non-Monetary Reparations

Reparations need not be monetary or individual, and in recent years, collective reparations have been increasingly incorporated into responses to conflict-related sexual violence.<sup>278</sup> Using both individual and collective reparations reflects, as one scholar articulated, “the growing trend towards complexity, as well as, in many situations, a concession to the need to reach out to a wide universe of victims with meager resources.”<sup>279</sup> In this setting, reparations serve not only as a remedy and recognition of group-based rights violations, but have a symbolic purpose as an “expression of commitment” of the political system to protect certain rights.<sup>280</sup>

The term collective reparations can refer to a number of measures and often serves multiple goals simultaneously. For example, “collective” may refer to a benefit being given to a group rather than individual victims, a benefit that is a public or non-excludable good, a benefit focused on a certain geographical region, and forms of redress focusing on group-based violence.<sup>281</sup> These include concrete things like sensitization campaigns regarding violence against women, training army and police on women’s rights, vetting public-order forces, gender-sensitive school programs, symbolic reparations such as collective apologies, gender quotas, or measures to encourage women’s political participation, and reforming political and legal systems to remove traces of discrimination against women.<sup>282</sup> From the rehabilitative perspective, reparations can range from providing legal, health, psychological, and other social services<sup>283</sup> to more symbolic, reconciliatory actions like apologies, commemorations, and memorials.<sup>284</sup> These latter symbolic measures also serve the other modalities of reparation like satisfaction and guarantees of non-repetition, namely commitment to combating future conflict-related sexual violence.<sup>285</sup> However, these measures may not be successful if undertaken without victim consultation.

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.cc/QEG2-CN29] (archived Sept. 1, 2018); see also Nehal Mostafa, *Yazidi activist: Islamic State detains Iraqi women, children in underground prisons in Syria*, IRAQI NEWS (June 1, 2018), <https://www.iraqinews.com/iraq-war/yazidi-activist-islamic-state-detains-iraqi-women-children-in-underground-prisons-in-syria/> [https://perma.cc/6ZA9-6ZM2] (archived Sept. 1, 2018) (describing hundreds still in captivity as of June 2018).

278. See, e.g., Ruth Rubio-Marín, *Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue*, 19 WM. & MARY J. WOMEN & L. 69, 95 (2012).

279. *Id.*

280. Rubio-Marín, *supra* note 278, at 383.

281. *Id.* at 385.

282. *Id.* at 395.

283. Reparations Guidance Note, *supra* note 84, at 18–19.

284. Rubio-Marín, *supra* note 278, at 397.

285. Reparations Guidance Note, *supra* note 84, at 19–20.



In all kinds of accountability mechanisms—criminal, compensatory, and collective reparations—a major hurdle to achieving these broader goals is overcoming the stigma associated with victims of wartime rape or sexual violence. From the perspective of the perpetrator, rape in conflict frequently is designed to foster and encourage this stigma to the point of destroying the social fabric of certain groups—possibly even rising, as many have argued in the case of the Yazidis, to the level of genocide.<sup>286</sup> This kind of stigma is universal in post-conflict situations and may exist even when government and community leaders make efforts to reintegrate rape victims without any shaming. To provide one example, after the war of independence in the 1970s, the Bengali government publicly labeled sexual violence victims as “war heroines,” with the prime minister calling these *birangonas* his “daughters.”<sup>287</sup> However, despite these public overtures to welcome victims back into the community, many *birangonas* were disrespected and shamed to the point of suicide or fleeing the country.<sup>288</sup>

In the case of Iraq, there are reasons to be more optimistic about the stigma and the possibility of other, transformative collective reparations. First, the plight of the Yazidis and other victims of ISIL’s sexual enslavement has been well-documented in the global media, and international voices continue to call for justice. On the ground, local Kurdish and Yazidi efforts in this area have been promising for those survivors of ISIL. The Yazidi faith has traditionally condemned those who have converted to other religions, even when coerced, and has endorsed views on women’s purity and dignity that allow for honor killings.<sup>289</sup> However, the horrors the Yazidis faced at the hands of ISIL have altered some of these practices and beliefs. Activists approached religious leaders to publicly and officially change doctrine; leaders listened and created a new religious ceremony, a form of baptism, for enslaved women to reenter the faith.<sup>290</sup> The

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286. Press Release, Security Council, Shame, Stigma Integral to Logic of Sexual Violence as War Tactic, Special Advisor Tells Security Council, as Speakers Demand Recognition for Survivors, U.N. Press Release SC/12819 (May 15, 2017); see also Courtney McCausland, *From Tolerance to Tactic: Understanding Rape in Armed Conflict as Genocide*, 25 MICH. ST. INT’L L. REV. 149, 179, 182 (2017) (using literature on the Rwandan genocide that explains how “many rapists expected, consequent to their attacks, that the psychological and physical assault on each Tutsi woman would advance the cause of the destruction of the Tutsi people”).

287. McCausland, *supra* note 286, at 183.

288. See *id.* (describing the Prime Minister’s futile efforts in light of Bengali traditional views of purity and sexuality).

289. See Tiffany Barrans, *Realizing Universal Women’s Rights Through Deeply Local Grassroots Advocacy*, 22 TRINITY L. REV. 57, 62 (2016) (describing how before ISIL, family and community members may carry out an honor killing of Yazidi rape victim because of the shame the rape brought to the family and the community).

290. *Id.* at 62–64 (quoting one survivor who said the baptism helped her “be clean again” after her assaults).

spiritual leader Baba Sheik issued an edict and called on the community to cooperate so the victims may return to their normal lives and rejoin society.<sup>291</sup> Furthermore, at least in the Kurdistan region, there has been some shelter and center support. Foreign governments and organizations have partnered with locals to open several centers for displaced individuals, particularly Yazidi women.<sup>292</sup> These kinds of actions, in combating the stigma surrounding sexual violence, can make a world of difference for survivors and should be encouraged for all victims of sexual violence.

Other reforms, identified by local women's advocates and NGOs, have the potential to provide significant material and symbolic support to victims of the conflict and to enact more lasting changes in line with CEDAW's goals of eliminating discrimination. For example, NGOs have advocated for changes to Iraq's laws in order to permit non-government women shelters to support these women. Currently, the Iraqi government has only permitted government-run shelters to operate in the country, preventing local NGOs from providing immediate aid to at-risk individuals in southern and central Iraq, particularly women.<sup>293</sup> Domestic violence shelters are viewed as helping women disobey their male relatives or even as brothels; the fear is that the availability of shelters will dismantle Iraqi families.<sup>294</sup> Allowing non-governmental shelters across the whole country would make a significant difference to local communities by creating supportive services and encouraging community jobs.<sup>295</sup>

Another major reform that would empower women fleeing or residing in conflict areas is the removal of certain requirements for legal identification for women. Iraqi Civil Status Identification Documents and Nationality Certificates are vital for public services like food assistance, healthcare, school for their children, and housing, but women can only obtain such identification if they have a male family member who can corroborate their identity.<sup>296</sup> Such

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291. Maher Chmaytelli, *Yazidi leader seeks protection for community after genocide*, REUTERS (Dec. 8, 2016), <https://www.reuters.com/article/us-mideast-crisis-iraq-yazidis/yazidi-leader-seeks-protection-for-community-after-genocide-idUSKBN13X11G> [<https://perma.cc/XQ93-GXLM>] (archived Sept. 2, 2018).

292. *Community Centers offer support to survivors of sexual violence in Iraq*, NORWEGIAN PEOPLE'S AID (Sept. 30, 2016), <https://www.npaid.org/News/News-archive/2016/Community-Centers-offer-support-to-survivors-of-sexual-violence-in-Iraq> [<https://perma.cc/J34K-PSP9>] (archived Sept. 2, 2018).

293. Lisa Davis, *Iraqi Women Confronting ISIL: Protecting Women's Rights in the Context of Conflict*, 22 SW. J. INT'L L. 27, 63–64 (2016).

294. *See id.* at 64 (quoting an Iraqi official who stated, after denial of a license for opening a domestic violence shelter, the establishment of such shelters would lead the majority of women to exploit the role and leave their families).

295. *See id.* at 65 ("In the absence of government-sponsored services and legal remedies to address gender-based violence, Iraqi women's NGOs are at the forefront of providing necessary services.").

296. *See id.* at 68–69.

requirements have serious repercussions for women, who may be more likely to suffer violence, trafficking, and discrimination as a result of being denied social services.<sup>297</sup> The regional government of Kurdistan has responded to these problems, in part, by issuing temporary identification to some displaced persons who can prove their identities through letters of support or other government identification documents.<sup>298</sup>

These are just a few of the reforms important for survivors of sexual violence—other significant collective reparations include access to healthcare services, ensuring documentation of human rights abuses, and actually funding the Iraqi laws in place that recognize the vulnerabilities of women during conflict and prescribe a variety of solutions.<sup>299</sup> Iraq should work with those international actors and NGOs who have pledged to provide millions of dollars to rebuild and provide much needed public and humanitarian services and stability for recovering communities like the Yazidis.<sup>300</sup>

## V. CONCLUSION

It is clear the story of ISIL in Iraq and Syria is far from over. In recent weeks, investigators with the UN have found over two hundred mass grave sites containing the remains of at least six thousand victims, with other estimates closer to twelve thousand.<sup>301</sup> Moreover, in October 2018 the Nobel Peace Prize was awarded to activist Nadia Murad and Dr. Denis Mukwege, a Congolese

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297. *See id.* (“Lack of legal access to an identification card paves the way for traffickers aided by sophisticated criminal networks to forge documents and pay corrupt officials to remove impediments in order to traffic women and children.”).

298. *Id.*

299. *See id.* at 75–76 (describing the National Action Plan passed by the Iraqi Government in 2015, which acknowledges many of the vulnerabilities and issues surrounding sexual violence in conflict but has not been supported with funding).

300. Seth J. Frantzman, *Yazidis Who Saw Genocide Still Insecure in Iraq’s Sinjar Region*, JERUSALEM POST (June 3, 2018), <https://www.jpost.com/Middle-East/Yazidis-who-saw-genocide-still-suffer-insecurity-in-Iraqs-Sinjar-region-559055> [<https://perma.cc/RQ7B-8Q6N>] (archived Sept. 2, 2018) (describing conditions and frustrations of Yazidis who have lived in refugee camps for years); *NGOs pledge \$330m as Iraq seeks \$90bn for reconstruction*, KUWAIT TIMES (Feb. 12, 2018), <http://news.kuwaittimes.net/website/ngos-pledge-330m-iraq-seeks-90bn-reconstruction/> [<https://perma.cc/RJ23-NCPF>] (archived Sept. 2, 2018).

301. Bill Chappell, *Islamic State Dumped At Least 6,000 Bodies in Mass Graves in Iraq, U.N. Says*, NPR (Nov. 6, 2018), <https://www.npr.org/2018/11/06/664641098/islamic-state-dumped-at-least-6-000-bodies-in-mass-graves-in-iraq-u-n-says>; *see generally* U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *UNEARTHING ATROCITIES: MASS GRAVES IN TERRITORY CONTROLLED BY ISIL* (2018), [https://www.ohchr.org/Documents/Countries/IQ/UNAMI\\_Report\\_on\\_Mass\\_Graves4Nov2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/IQ/UNAMI_Report_on_Mass_Graves4Nov2018_EN.pdf).

gynecologist who has treated thousands of rape victims, for their “efforts to end the use of sexual violence as a weapon of war.”<sup>302</sup>

The ISIL conflict that has consumed Iraq and Syria these past few years is no exception to the rule that war will always include high levels of sexual violence. The emergence of ISIL and their brutal yet bureaucratic tactics, like the enslavement of Yazidis like Nadia, has renewed focus on the mechanisms and frameworks for criminal liability for perpetrators of war crimes, including sexual violence offenses.

Despite the inevitable combination of war and sexual violence, international law has been slow to respond. The history of gender-based violence has long been one of silencing victims and impunity for perpetrators of these crimes; these aspects are only amplified when there is destructive conflict and a difficult transition to peace. While women’s voices in particular have forced the international community to respond to gender-based violence, overall, there are still shortcomings in addressing this kind of violence in the structures and mechanisms of international law. CEDAW, for example, remains one of the sole “treaty-tools” for addressing gender-based violence and conflict-related sexual violence. However, although CEDAW has been greatly expanded to include these issues, there remains a gap as long as the treaty does not explicitly discuss violence against women, in peace or in war.

Still, as the legal frameworks stand, these extensive interpretations of CEDAW remain the best framework for addressing conflict-related sexual violence in places like Iraq. The due diligence standard requires states to act reasonably to prevent, punish, investigate, or redress harms caused by nonstate actors, including acts of violence towards women. In the case of Iraq in the aftermath of ISIL, there is ample opportunity to adhere to its obligations to investigate, punish, and redress those who suffered sexual violence at the hands of ISIL. While international prosecutions are unlikely, Iraq’s own domestic prosecution of ISIL members should incorporate victims of sexual violence into the legal process and charge sexual crimes so the perpetrators of such crimes are punished for them. Iraq, in particular, should take advantage of all international aid provided, including the investigative resources of the United Nations, to ensure its trials are fair and victim-centric. Additionally, there are several concrete reforms Iraq can implement both to redress victims of sexual violence and to eliminate structural discrimination in its own laws and society. These include legal, psychological, and health services, a

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302. *Nobel Peace Prize for Anti-Rape Activists Nadia Murad and Denis Mukwege*, BBC (Oct. 5. 2018), <https://www.bbc.com/news/world-europe-45759221>.

potential compensatory reparations program, working with NGOs to permit more women's shelters, and repealing stringent laws exacerbating vulnerabilities of women, like the identification requirements.

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